IN THE

SUPREME COURT of the United States

EDWARD E. JENKINS, receiver of The National City Bank of Salt Lake City, Utah, et al.,
Petitioners,

vs.

NATIONAL SURETY COMPANY OF NEW YORK,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Edward E. Jenkins, as receiver of The National City Bank of Salt Lake City, Utah, E. J. Groesbeck, treasurer of Salt Lake County, Utah, the American Surety Company of New York, a corporation organized under the laws of the State of New York, respectfully present to this court this their petition for a writ of certiorari addressed to the Circuit Court of Appeals for the Eighth Circuit, commanding said court and the clerk thereof to certify to this court the record and proceedings in the case in said court wherein your petitioners are appellees and the respondent herein is appellant (C. C. A. No. 7409), together

with the opinion of the court therein for review and determination of said cause by this court.

In this behalf petitioners state the following facts:

I.

Your petitioners exhibit as part of this petition a certified copy of the record furnished the Circuit Court of Appeals, a printed copy of the proceedings in the Circuit Court of Appeals, including its decree of reversal, and the opinion of the District Court, together with a brief in support of this petition.

II.

On April 28, 1925, the respondent, National Surety Company of New York, brought its complaint against the receiver of The National City Bank of Salt Lake City to compel the allowance of its claim as a creditor of the bank in the sum of $120,000.00, based upon an indemnity agreement entered into between the failed bank and the National Surety Company at the time of the execution of the depository bond furnished by the bank to Groesbeck, and further to compel the payment by the receiver of dividends on said claim. At the instance of the receiver, the American Surety Company of New York and E. J. Groesbeck, as treasurer of Salt Lake County, were required to interplead in the action.

III.

E. J. Groesbeck was the county treasurer of Salt Lake County and the funds which came into his hands as such county treasurer he deposited with The National City Bank of Salt Lake City.

When E. J. Groesbeck qualified as treasurer of Salt Lake County he, as principal, and the American Surety Company of New York, as surety, executed and delivered to Salt Lake County an official fidelity bond in the sum of $200,000.00.

To protect the deposits made by him in the bank Groesbeck secured from the bank, as principal, three depository bonds: one executed by the National Surety Company, as surety, in the sum of $125,000.00, one by the Fidelity & Deposit Company of Maryland, as surety, in the sum of $75,000.00, one by the Massachusetts Bonding & Insurance Company, as surety, in the sum of $25,000.00. These three bonds ran to E. J. Groesbeck, treasurer of Salt Lake County, Utah, as obligee.

The National Surety Company's depository bond provided that if the bank "shall well and truly keep all sums of money so deposited or to be deposited" and "shall pay over the same" upon Groesbeck's demand and "shall in all respects save and keep the said Edward J. Grosbeck, treasurer, harmless and indemnified for and by reason of the making of said deposit or deposits, then this obligation shall be void and of no effect, otherwise to be and remain in full force and virtue." (R. 63-64.) By way of further depository security the bank deposited with E. J. Groesbeck Crystal Lake Farm bonds of the par value of $360,000.00.

In its application to the National Surety Company for the depository bond executed by that company as surety, the bank agreed to indemnify the National Surety Company for all losses it might suffer thereunder. It is upon this indemnity agreement that the National Surety Company bases its claim and predicates this suit.

IV.

At the time of the failure of the bank on January 17, 1922 Groesbeck's deposits amounted to $643,094.29. Salt

Lake County has been repaid in full by Groesbeck and his surety, the American Surety Company, as follows: by the American Surety Company of New York $200,000.00 principal, $23,362.15 interest; by $125,000.00 secured from the National Surety Company; by $75,000.00 secured from the Fidelity & Deposit Company; by $25,000.00 secured from the Massachusetts Bonding Company; by $218,094.29 dividends received from Jenkins as receiver.

V.

Groesbeck's deposit has not yet been repaid and there is no prospect that either he or his assignee or subrogee, the American Surety Company, will ever be repaid or made whole by many thousands of dollars if the present decision of the Circuit Court of Appeals stands and if the National Surety Company is thereby allowed to compete with Groesbeck and his assignee in the enjoyment of dividends from the bank's assets.

VI.

This is the second suit between these parties involving the right to dividends from the receiver of the National City Bank of Salt Lake City. In the first suit the National Surety Company, as an interpleaded defendant, asserted that it and not E. J. Groesbeck or his assignee and subrogee the American Surety Company of New York, was entitled, upon payment in full to the county, to be subrogated to all future dividends paid on account of Groesbeck's deposit. The National also asserted it was entitled to have its indemnity claim allowed and dividends paid thereon. The indemnity claim relied upon in the first suit was re-filed and made the basis of this suit. The claim filed discloses that $5,000.00 of the $125,000.00 paid by the National Surety Company was assigned to the American Indemnity Com-

pany of Galveston, Texas. In the first suit the National Surety Company stipulated that until Salt Lake County was paid in full it was not entitled to receive anything from Jenkins as receiver. (R. 151.)

VII.

In the first suit the American Surety Company filed an answer denying the right of the National Surety Company to subrogation or to recover dividends under its indemnity agreement. The District Court decided that E. J. Groesbeck and the American Surety Company of New York, his assignee and subrogee, were entitled to prior rights of subrogation, both as to dividends from the bank, and to the proceeds of the Crystal Lake Farm bonds until Groesbeck's deposit had been wholly repaid and until the sum previously paid to Salt Lake County by the American Surety Company of New York, to-wit, $223,362.15, with interest as specified in the decree, had been paid in full before the National Surety Company could receive anything upon its claims as shown by its complaint in intervention. (R. 107-109.) That decision was affirmed by the Circuit Court of Appeals (See National Surety Company v. Salt Lake County, 5 Fed. (2d) 34. (R. 110.)

At the conclusion of that litigation the National Surety Company re-filed its indemnity claim relied upon in the first suit and thereupon brought its present complaint.

VIII.

The District Court, upon the trial of this action, held that the subject matter of the action was fully determined and adjudicated by its prior decree and approved and allowed the National Surety Company's claim subject, however, to the limitation and qualification that it should have

and recover nothing from the receiver until Groesbeck and his assignee, the American Surety Company, have received from the assets of the bank, including proceeds from the Crystal Lake Farm bonds, the sum of $223,362.15, together with interest on the sum of $200,000.00 from February 29, 1924, as provided in the prior decree of the court. The decree further qualified the allowance of the National Surety's claim by providing that its allowance "shall not affect the present basis of computing and paying dividends as now established by the receiver upon claims heretofore approved." (R. 51-52.)

IX.

This case went to the Circuit Court of Appeals and on March 28, 1927, that court, in an opinion delivered by District Judge Phillips and concurred in by District Judge J. B. Sanborn and Circuit Judge Booth, ordered the decree of the District Court reversed and the cause remanded with instructions to enter a decree directing the receiver to approve and allow the claim of the National Surety Company for the sum of $120,000.00 on its contract of indemnity as a general creditor and to pay dividends thereon pro rata with the other general creditors, including dividends heretofore paid to general creditors.

The Circuit Court of Appeals decided that the subject matter of this controversy was not re judicata and further decided that even though the record discloses without contradiction that E. J. Groesbeck, the depositor, has not been paid in full, still the National Surety Company, which guaranteed his deposit, may to his detriment receive dividends from, and thereby deplete, the only fund to which he can look for repayment. The briefs of both parties filed with the Circuit Court of Appeals in connection with the petition for rehearing and modification of the de-

cree disclose that the Crystal Lake bonds have been disposed of but that the proceeds received from that source plus bank dividends have not yet paid Groesbeck and his assignee in full, and the only remaining source from which they may be paid the many thousands of dollars still due them is through possible future dividends from the receiver.

X.

The amount of Groesbeck's deposit on the day the bank failed was $643,094.29. By reason of a special provision in its bond, the Fidelity & Deposit Company, upon payment of its depository bond, was given a receiver's certificate in the sum of $75,000.00, thereby reducing Groesbeck's claim against the receiver to $568,094.29. The amount of approved claims against the bank, according to the record, is $1,583,926.88. (R. 70.) It follows that Groesbeck's claim amounts to more than one-third of all approved claims against the bank, and if the decision of the Circuit Court of Appeals stands it will result that of every dollar the National Surety Company receives it will get one-third of that dollar at Groesbeck's loss and expense.

The receiver has paid 60 per cent to general creditors. Under the decision of the Circuit Court of Appeals the National Surety Company and its assignee will receive that 60 per cent or $75,000.00 at once. Approximately $25,000.00 of that amount would otherwise go to help make Groesbeck and his assignee and subrogee whole. There will be a similar proportionate loss to Groesbeck on any future dividends which may be paid. It will result under the decision of the Circuit Court of Appeals that the National Surety Company, which guaranteed the whole of E. J. Groesbeck's deposit and agreed that it would, in any event, lose $125,000.00 before Groesbeck should lose anything, will reduce

its and its assignee's loss at least $75,000 while he and the American are still unpaid.

XI.

Groesbeck, in his application to the American Surety Company for his official bond, agreed, as the bank did in its application to the National for depository bond, to indemnify the American Surety Company against loss.

XII.

Petitioners seek a review of the decision of the Circuit Court of Appeals reversing the judgment of the trial court.

THE QUESTIONS AND PROPOSITIONS OF LAW INVOLVED IN THE CASE ARE SUBSTANTIALLY AS FOLLOWS:

1. Is a depository surety entitled to receive dividends from a failed bank before its obligee, who deposited funds with the bank in reliance upon such surety's bond, has been paid in full where such surety guaranteed such deposit without qualification or limitation save as to the penalty of its bond?

2. Is such surety company, by virtue of its indemnity agreement with the bank, its principal, a creditor of the receiver in such a sense as to be entitled to receive pro rata dividends with those who were depositors and creditors of the bank prior to its failure?

3. Did the decision of the District Court, affirmed by the Circuit Court of Appeals in the first case between these parties adjudicate and dispose of the right of the National Surety Company to recover upon its claim based upon its indemnity agreement in such a way as to render that question res judicata in the present litigation?

4. In view of the decision of the District Court and the Circuit Court of Appeals in the first case between these

parties, which litigation involved this identical fund, can the National now claim rights through the remedy of indemnity which render nugatory and nullify the result of the prior decision of the Circuit Court of Appeals? Does not the decision in the original case establish the contractual obligation of the National as standing behind Groesbeck's entire deposit, even though the National's bond has a limited penalty, and prevent the National from receiving anything at Groesbeck's expense until that contractual obligation has been fully discharged by the National?

5. Does payment by a depository surety of the penalty of its bond, after the failure of the bank, establish the relationship of debtor and creditor between the surety and the bank from the date of the execution of said depository bond so as to entitle the surety to share in dividends with its obligee and other depositors in the bank before the depositor whom it assured is repaid?

The foregoing questions and propositions of law, which petitioners state are involved in this case, were duly raised and argued by petitioners in said District Court and in said Circuit Court of Appeals.

THE GROUNDS JUSTIFYING THE ISSUANCE OF THE WRIT.

Upon this statement of the facts and the record in the cause, the petitioners submit the following reasons, among others, why the writ herein prayed for should be allowed and why the decree of the Circuit Court of Appeals reversing the decree of the District Court and remanding the cause to that court with directions to allow the National Surety Company's claim and to pay dividends thereon, should be brought here for review by this court:

1. The decision of the Circuit Court of Appeals creates a conflict of decisions between the Circuit Courts

of Appeals of the United States, in that the decision complained of is opposed to and squarely at variance with the decision of the Fourth Circuit Court of Appeals in the case of Maryland Casualty Company v. Fouts, Lacy, State Treasurer of North Carolina, 11 Fed. (2d) 71, and with the decision of the Sixth Circuit Court of Appeals in Springfield National Bank, et al. v. American Surety Company of New York, 7 Fed. 2d. 44, and with the decision of the Ninth Circuit Court of Appeals in Fidelity and Deposit Company of Maryland v. Robinson, 7 Fed. (2d) 371, wherein the identical questions raised and decided by the Eighth Circuit Court of Appeals in this case are raised and an opposite result is reached.

2. These conflicting decisions in the different circuits involve a matter of general and public interest that is bound almost certainly to arise with every failure of a national bank and should be reconciled and one uniform ruling established. The Government of the United States by and through the Comptroller of the Currency, is engaged in the liquidation of failed national banks throughout the entire United States. Pending the laying down of such uniform rule depositors in failed national banks will receive more in some circuits and less in others, depending upon whether depository sureties do or do not share with them as creditors in dividends paid by the bank. The National Banking Act enjoins upon the Comptroller of the Currency and his several receivers the establishment of a basis for the payment of dividends which will eventuate in all cases in fair and ratable distribution of the bank's assets. Until this question is settled by this court the Comptroller of the Currency cannot establish in all circuits a uniform basis of computing and paying dividends. If the parties in this litigation resided in the Fourth Circuit, Groesbeck and the other depositors of the National City Bank would enjoy

that portion of the assets of the bank which the Circuit Court of Appeals of the Eighth Circuit has directed the receiver to pay to the National and which would have to be paid to other depository sureties similarly situated.

This is not only an important question that vitally affects depositors in banks generally and especially in national banks, and that affects the Comptroller's uniformity of set up, but it is also a question that vitally affects the surety companies and all banks of the country since they now have occasion to furnish and secure, practically without exception, depository bonds in larger or smaller amounts. This problem therefore affects an important branch of the Treasury Department, as well as bank depositors, banks, and surety companies and is a question of general public concern and importance that should be settled once and for all so that uniformity in rights and liabilities throughout all the circuits will be established.

3. The decision of the Circuit Court of Appeals herein allowing the National's claim and the payment of dividends thereon involves a ruling upon important questions of general law that is untenable and that is contrary to the great weight of authority.

4. The decision of the Eighth Circuit Court of Appeals conflicts with the decision of the same court in the former case involving the same parties and the same funds.

5. The decision of the Circuit Court of Appeals involves the construction of the National Banking Act and the distribution of assets of failed banks thereunder and effects an unfair distribution of the assets under that Act.

6. The doctrine of relation back announced in the decision of the case of United States Fidelity and Guaranty Company v. Centropolis Bank of Kansas City, Mo., et. al. (C.C. A. 8 opinion filed February 9, 1927, 17 Fed. (2d) 913) which decision is made to control the suretyship aspect

of the court's decision in this case, and by virtue of which doctrine the relation of debtor and creditor between the National Surety Company and the National City Bank of Salt Lake City is in effect held to have existed from the date of the execution of the bond and indemnity agreement herein sued upon, is at variance with the great weight of authority. It conflicts with the rulings of other Circuit Courts of Appeal and the uniform decisions of this court on the very proposition of relation back down as late as the case of United States Fidelity and Guaranty Company v. Wooldridge, Rec., 268 U. S. 234, 69 L. Ed. 932. The Circuit Court of Appeals failed to follow or give any force and effect to the rulings and decisions of this court on the doctrine of relation back.

7. The Circuit Court of Appeals erred in reversing the decision herein of the District Court of the United States for the District of Utah.

8. The Circuit Court of Appeals erred in holding and determining that this cause be remanded with instructions to enter a decree directing the receiver of the bank to allow the claim of the National Surety Company for the sum of $120,000.00 on its contract of indemnity as a general creditor and to pay dividends thereon pro rata with the other general creditors, including dividends heretofore paid to general creditors.

9. The Circuit Court of Appeals erred in holding and determining that the National Surety Company is entitled to receive anything by virtue of its contract of indemnity with the bank until E. J. Groesbeck and the American Surety Company of New York, his assignee and subrogee, have been made whole and until E. J. Groesbeck's entire deposit with the bank has been paid.

10. The Circuit Court of Appeals erred in failing to hold that as a matter of contract the bond of the National

Surety Company stood behind the entire deposit of the Treasurer E. J. Groesbeck, and that until that deposit has been paid in full and the Treasurer E. J. Groesbeck has been made whole, the National Surety Company can recover nothing on its indemnity agreement. The decision in this respect is squarely in conflict with the prior decision of the Circuit Court of Appeals between these same parties.

11. The Circuit Court of Appeals erred in holding that the National Surety Company is not barred from maintaining this action under and by reason of the doctrine of res judicata.

12. The Circuit Court of Appeals erred in failing to hold that it is the final amount left unpaid by the National City Bank which was intended to be secured and which was secured by the National Surety Company's bond, and that the National Surety Company agreed to lose $125,000.00 clear before E. J. Groesbeck should lose anything and that, therefore, the National ought not and cannot by virtue of its indemnity agreement, reimburse itself by receiving dividends from the bank in competition with Groesbeck, thereby depleting the very fund from which alone Groesbeck can be made whole, recouping its own loss so that it does not lose $125,000.00 clear, and substantially reducing the amount which Groesbeck would otherwise receive by way of dividends from the bank.

Your petitioners are advised that the decree of the Circuit Court of Appeals is final and is erroneous and that this Honorable Court should require the case to be certified to it for its review and determination under the Act of Congress permitting such cases to be certified to this court for its revision.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this court directed to the United States Circuit Court of

Appeals for the Eighth Circuit, commanding said court to certify and send to this court on a day certain to be in said writ designated, a full and complete transcript of the record and all proceedings of said Court of Appeals in this case which was entitled in that court "National Surety Company, a corporation, Appellant, v. Edward E. Jenkins, receiver of National City Bank of Salt Lake City, Utah, et. al., Appelles, No. 7409" to the end that said cause may be reviewed and determined by this court as provided by law, and that your petitioners may have such other and further relief or remedy in the premises as to this court may seem appropriate, and that the said decision of the said Circuit Court of Appeals in said case, and every part thereof, may be reversed by this Honorable Court.

EMMETT M. BAGLEY,
Solicitor for
EDWARD E. JENKINS,
Receiver National City Bank.
Petitioner.

JOHN JENSEN,
Solicitor for
AMERICAN SURETY COMPANY OF NEW YORK,
E. J. GROESBECK,
Petitioners.

ROBERT L. JUDD,
PAUL H. RAY,
of Counsel.
A. M. CHENEY,
HAROLD M. STEPHENS,
of Counsel.

STATE OF UTAH,
COUNTY OF SALT LAKE. } ss.

JOHN JENSEN, being first duly sworn, on his oath deposes and says:

That he is one of the Solicitors for E. J. Groesbeck and the American Surety Company of New York, petitioners in the above entitled action; that he knows the facts stated in said petition and of the proceedings had in said cause, and that the facts therein are true to the best of his knowledge and belief.

JOHN JENSEN.

Subscribed and sworn to before me this 13th day of July, 1927.

MANOLA JORGENSEN,
Notary Public.
Residence: Salt Lake City, Utah.

STATE OFUTAH
COUNTY OF SALT LAKE } ss.

E. M.BAGLEY, being first duly sworn, on his oath, deposes and says:

That he is one of the Solicitors for Edward E. Jenkins, receiver of the National City Bank of Salt Lake City, Utah, petitioner in the above entitled action; that he knows the facts stated in said petition and of the proceedings had in said cause, and that the facts therein are true to the best of his knowledge and belief.

E. M. BAGLEY

Subscribed and sworn to before me this 13th day of July, 1927.

MANOLA JORGENSEN,
Notary Public.
Residence: Salt Lake City, Utah.

CERTIFICATE OF COUNSEL

We and each of us de hereby certify that we have severally examined the foregoing petition for a writ of certiorari, and that the allegations therein are true as we verily believe, and it is our opinion that the petition is well founded and the case is one in which the prayer of the petitioners should be granted by the court.

EMMETT M. BAGLEY
ROBER L. JUDD
PAUL H. RAY
Solicitors of Edward E. Jenkins, Receiver.

A. M. CHENEY
JOHN JENSEN
HAROLD STEPHENS
Solicitors for E. J. Groesbeck, American Surety Company.

IN THE

SUPREME COURT OF THE UNITED STATES

EDWARD E. JENKINS, receiver of The National City Bank of Salt Lake City, Utah, et al.,

Petitioners,

vs.

NATIONAL SURETY COMPANY OF NEW YORK,

Respondent.

BRIEF IN SUPPORT OF PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS OF COURTS BELOW

The decree of the District Court for the District of Utah in this case dated December 31, 1925, appears at page 51 of the record, and the opinion of the Circuit Court of Appeals of the Eighth Circuit dated March 28, 1927 (rehearing denied June 14, 1927), reversing the decree of the District Court appears at page 232 thereof. (18 Fed. (2d.) 707). The Circuit Court's holding on the suretyship aspect of this case is controlled by and rested upon its decission in the case of United States Fidelity & Guaranty Company v. Centropolis Bank of Kansas City, Mo., et al., opinion filed February 9, 1927, (17 Fed. (2d) 913), and for the convenience of the court is printed in full as an appendix to this brief.

The decree of the District Court in the first case between these same parties involving this same matter appears at page 107 of the record, and the opinion of the Cir-

cuit Court of Appeals of the Eighth Circuit affirming that decree appears at page 110 thereof (5 Fed. (2d) 34).

JURISDICTION

The jurisdiction of this court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, (c. 229, 43 Stat. 936, 938).

STATEMENT OF FACTS

Edward E. Jenkins is receiver of the National City Bank of Salt Lake City, Utah. Up until January 17, 1922, the day of its failure, the bank was engaged in a general banking business in Salt Lake City, Utah. E. J. Groesbeck was treasurer of Salt Lake County. Upon his election and qualification as such he, as principal, and the American Surety Company, as surety, gave to Salt Lake County a fidelity bond in the sum of $200,000.00, conditioned upon his safely keeping all funds of Salt Lake County coming into his hands as treasurer. Thereafter Groesbeck deposited funds coming into his hands as treasurer with the National City Bank. To protect his deposit Groesbeck received from the bank three depository bonds: one for $125,000.00 with the National Surety Company as surety; one for $75,000.00 with the Fidelity and Deposit Company of Maryland as surety, which provided for immediate pro tanto subrogation; one for $25,000.00 with the Massachusetts Bonding & Insurance Company as surety. In addition the bank delivered to Groesbeck as collateral $360,000.00 par value of the bonds of the Crystal Lake Farms Company. The briefs on petition for rehearing and motion of the National to modify decree disclose that since the argument before the Circuit Court of Appeals the Crystal Lake Farm bonds have been sold for slightly less than $90,000.00.

This fact does not alter the case as Groesbeck and his assignee, the American, are still unpaid and have no prospect of being paid in full by many thousands of dollars if the decision of the Circuit Court of Appeals stands.

When Groesbeck as treasurer applied to the American Surety Company for his $200,000.00 official bond he agreed to indemnify and save said company free from loss on account of said bond. When the bank procured the depository bonds from the National Surety Company, Fidelity and Deposit Company of Maryland and the Massachusetts Bonding & Insurance Company it agreed to indemnify and save those companies harmless and free from loss on the depository bonds.

The National Surety Company's depository bond provided that if the bank "shall well and truly keep all sums of money so deposited or to be deposited" and "shall pay over the same" upon Groesbeck's demand, and "shall in all respects save and keep the said Edward J. Groesbeck, treasurer, harmless and indemnified for and by reason of the making of said deposit or deposits, then this obligation shall be void and of no effect, otherwise to be and remain in full force and virtue." (R. 63-64). It will be observed that the National's bond is a guarantee for the whole of Groesbeck's deposit without limitation or condition save as to penalty.

For brevity and convenience Edward E. Jenkins, as receiver, will hereinafter be referred to as receiver; E. J. Groesbeck, treasurer, will be referred to hereinafter as Groesbeck; the National Surety Company as the National, and the American Surety Company as the American.

Upon the day the bank failed Groesbeck had on deposit $643,094.29. This sum was deposited by him as treasurer of Salt Lake County, and Salt Lake County has been repaid in full as follows:

By the American Surety Company as surety on Groesbeck's official bond	$200,000.00
By the National Surety Company as depository surety	125,000.00
By the Fidelity and Deposit Company as depository surety	75,000.00
By the Massachusetts Bonding & Insurance Company as depository surety	25,000.00
By dividends from the receiver on account of the treasurer's deposit	218,094.29
Total	$643,094.29

It will be seen that Salt Lake County was made whole not alone by the payment of the depository bonds and dividends but by those payments plus $200,000.00 paid by the American as surety for Groesbeck. The American having paid this sum, together with $23,362.15 interest, and Groesbeck, being indebted to the American in that amount, he thereupon assigned to the American his rights against the bank and its receiver.

When it became apparent that the County was about to be made whole on account of moneys which Groesbeck had deposited in the bank, Groesbeck and the American made claim upon the receiver that they were entitled to all future dividends accruing on account of Groesbeck's deposit until such time as they were made whole. At the same time the National Surety Company and the Massachusetts Bonding & Insurance Company, as depository sureties, made claim to the receiver that they, having paid the full penalties of their depository bonds, were entitled to pro tanto subrogation against the receiver to the amount of their payments and were thereafter entitled to receive their pro tanto share of dividends on Groesbeck's deposit even before Groesbeck and the American were reimbursed. The de-

pository sureties also advanced their claims upon their indemnity agreements and demanded approval of their claims and payment of dividends thereon.

All parties agreed that by the terms of its bond the Fidelity and Deposit Company was, upon payment of the penalty of its bond, entitled to immediate subrogation in that amount. This resulted in a reduction of Groesbeck's claim from $643,094.29 to $568,094.29. The receiver refused to resolve these conflicting claims without a decree of the court.

Thereupon Groesbeck and the American Surety Company brought suit against the receiver in the United States District Court for the District of Utah. In their complaint the payment by the American, as surety on Groesbeck's official bond, was set up and claim made by Groesbeck and the American that the American and Groesbeck were entitled to receive all dividends thereafter accruing on account of Groesbeck's claim in said bank until such time as he and the American were made whole.

The receiver answered said suit and filed his bill of interpleader praying that the National and the Massachusetts Bonding & Insurance Company, depository sureties, be required to come into court and set up their claims, if any they had. As a result the National and the Massachusetts Bonding & Insurance Company came into court as interpleaded defendants. They denied the right of Groesbeck and the American to priority in the enjoyment of dividends paid and to be paid on account of Groesbeck's claim. The National moreover asserted that the bank in its application for depository bond had agreed to indemnify and save it harmless from any loss on account of the issuance of said bond and asserted that it was entitled to have its claim theretofore filed with the receiver in the amount of its depository bond approved and allowed and receive dividends

thereon, and specifically prayed for such relief (R. 91, 92, 93).

The American answered the complaint of the National in intervention and denied that the National was entitled to have its claim based upon its alleged indemnity agreement allowed and denied that the National was entitled to receive any dividends from the receiver until after the American and Groesbeck were paid in full. (R. 95, 96).

Upon the issues thus joined the trial was had and the issues were decided in favor of Groesbeck and the American and against the National and the Massachusetts Bonding & Insurance Company. (Attention is invited to decree in first suit. R. 107).

An appeal was taken from that decree to the United States Circuit Court of Appeals for the Eighth Circuit. The Circuit Court of Appeals affirmed the judgment of the trial court. (R. 110).

After the affirmance of the District Court's decree in the former case this action was filed in the United States District Court for the District of Utah by the National, wherein it alleged that by reason of the indemnity agreement given to it by the bank at the time its depository bond was issued, it was entitled to have its claim for $120,000.00 ($5,000.00 having been assigned to the American Indemnity Company) approved and allowed by the receiver and to receive dividends thereon notwithstanding Groesbeck and the American, his surety and assignee, had not been paid in full.

Again the receiver filed his answer and bill of interpleader and prayed that Groesbeck and the American be brought in to show such reasons as they might have why the claim of the National should not be approved and allowed and dividends paid thereon. The American and Groesbeck came into this action as interpleaded defendants.

Issue was joined between all parties and a trial had. The District Court held that the subject matter of this action was fully determined and adjudicated by its prior decree and that while the National's claim should be approved and allowed this should be specifically subject to the limitation and qualification that the National should receive nothing from the receiver by way of dividends until Groesbeck and the American his assignee, had been fully repaid the sum of $223,362.15, together with interest on the sum of $200,000.00 from February 29, 1924, as provided in the prior decree, and that the qualified allowance of the National Surety Company's claim should not affect the present basis of computing and paying dividends as established by the receiver upon claims theretofore approved. (R. 51).

This case then went to the Circuit Court of Appeals of the Eighth Circuit and on March 28, 1927, that court in an opinion delivered by District Judge Phillips, concurred in by Circuit Judge Booth and District Judge J. B. Sanborn, reversed the decree of the District Court and directed the District Court to enter a decree requiring the receiver to allow the claim of the National Surety Company on its contract of indemnity as a general creditor and to pay dividends thereon pro rata with the other general creditors, including dividends heretofore paid to general creditors.

The Circuit Court of Appeals held that the subject matter of this controversy was not res judicata and that even though Groesbeck and the American, his assignee and subrogee, have not been paid in full, the National, which guaranteed his whole deposit and agreed by its bond to save Groesbeck harmless and free from loss, shall be permitted to deplete the only fund out of which Groesbeck and the American can be made whole.

The suretyship aspect of this case is not discussed by the Circuit Court of Appeals in its decision. The Circuit

Court rests its ruling upon that feature of the case upon its decision in United States Fidelity & Guaranty Co., v. Centropolis Bank of Kansas City, Mo., et al., (C. C. A. 8, opinion filed February 9, 1927) 17 Fed. (2d) 913. For the convenience of the court we have printed that decision as an appendix to this brief.

The amount of approved claims against the bank at the time of the trial of this case was $1,583, 926.88. (R. 70). It follows that Groesbeck's claim in the sum of $568,094.29 (R. 67), amounts to more than one-third of all the approved claims. If, therefore, the decision of the Circuit Court of Appeals stands, the result will be that of every dollar paid the National out of the funds of the bank one-third will be received at the loss and expense of Groesbeck.

At the time of the trial the receiver had paid sixty per cent in dividends upon approved claims and estimated that at the outside he would be able to pay fifteen per cent additional. (R. 70) Under the decision of the Circuit Court of Appeals the National and its assignee will receive sixty per cent, or $75,000.00, more than $25,000.00 of which would otherwise go to Groesbeck and his assignee. It will result under the decision of the Circuit Court of Appeals that the National which guaranteed the whole of Groesbeck's deposit and agreed that it, the National, would in any event lose $125,000.00 before Groesbeck should lose anything, will by depletion of the banks assets reduce its loss from $125,000.00 to approximately $40,000.00, depending upon what further dividends may be paid by the receiver, and will at the same time leave Groesbeck, the depositor whom it agreed to protect, unpaid on account of his deposit.

The errors which petitioners urge both as ground for granting the writ of certiorari and for reversal of the decree of the Circuit Court of Appeals are:

SPECIFICATION OF ERROR

1. The court erred in holding that a depository surety of a failed bank is entitled to have its claim, based upon its indemnity agreement with such bank, allowed and dividends paid thereon before the obligee of such surety who deposited funds with the failed bank has been paid in full, where such surety guarantees the whole of such deposit without qualification or limitation save as to the penalty of its bond.

2. The court erred in holding that such surety company, after payment of the penalty of its bond, becomes, by virtue of its indemnity agreement with the failed bank, a creditor of the receiver in such a sense as to be entitled to receive pro rata dividends with those who were depositors and creditors of the bank prior to its failure.

3. The court erred in failing to hold that the decision in the first case between these parties adjudicated and disposed of the right of the National Surety Company to recover anything by way of dividends on its indemnity claim until Groesbeck was paid in full.

4. The court erred in failing to affirm and in reversing the decision herein of the District Court of the United States for the District of Utah.

5. The court erred in holding and determining that this cause be remanded with instructions to enter a decree directing the receiver to allow the claim of the National for the sum of $120,000.00 on its contract of indemnity as a general creditor and to pay dividends thereon pro rata with the other general creditors including dividends heretofore paid to general creditors.

6. The court erred in holding and determining that the National is entitled to receive anything by virtue of its contract of idemnity with the bank until Groesbeck and the American, his assignee and subrogee, have been made

whole and until Groesbeck's entire deposit with the bank has been paid.

7. The court erred in following and applying to this case its decision in the case of United States Fidelity & Guaranty Company v. Centropolis Bank of Kansas City, and particularly in applying to this case the doctrine of relation back therein announced and thereby holding that the relation of debtor and creditor existed between the National and the failed bank as of the date of the execution of the bond, since "the doctrine of relation 'is a legal fiction invented to promote the ends of justice . . . it is never allowed to defeat the collateral rights of third persons lawfully acquired' ".

8. The court erred in failing to hold that as a matter of contract the bond of the National stood behind Groesbeck's entire deposit and that until that deposit has been paid in full and Groesbeck has been made whole the National can recover nothing on its indemnity agreement.

9. The court erred in failing to hold that it is the final amount left unpaid by the bank which was intended to be secured and which was secured by the National's bond, and that the National agreed to lose $125,000.00 clear before Groesbeck should lose anything, and that therefore the National ought not and cannot by virtue of its indemnity agreement, reimburse itself by receiving dividends from the bank in competition with Groesbeck, thereby depleting the only fund from which Groesbeck can be made whole, and thereby recouping itself so that it does not lose $125,000.00 clear but substantially reduces that amount by receiving moneys which would otherwise go in part as dividends to Groesbeck and his assignee.

10. The court erred in holding that the National is not barred from maintaing this action under and by reason of the doctrine of res judicata.

ARGUMENT

I.

Rights of Depository Surety: as Against Depositor Whose Entire Deposit Such Surety has Guaranteed Without Qualification or Limitation Save as to the Penalty of its Bond; and as Against Depositors and Creditors of the Bank at the time of its Failure.

The conditions of the depository bond furnished by the National to Groesbeck are as follows:

> "Now, Therefore, if the said The National City Bank of Salt Lake City, shall, at the beginning of each and every month render to the said Edward J. Groesbeck, treasurer, a statement, in duplicate, showing the daily balance of the County of Salt Lake's moneys held by it during the month next preceding and the interest thereon, and how the same has been credited, and shall well and truly keep all said sums of money so deposited or to be deposited, as aforesaid, and the interest thereon, subject at all times to the check and order of the said Edward J. Groesbeck, treasurer as aforesaid, and shall pay over the same, and any part thereof upon the check or written demand of the said Edward J. Groesbeck, treasurer, and to his successor in office as shall be by him demanded, and shall calculate, credit and pay said interest as aforesaid, and shall in all respects save and keep the said Edward J. Groesbeck, treasurer, harmless and indemnified for and by reason of the making of said deposit or deposits, then this obligation shall be void and of no effect, otherwise to be and remain in full force and virtue." (R.63, 64)

It will be noted that the bond runs to the treasurer and is conditioned upon the bank "well and truly keeping all sums of money deposited at all times subject to the check of the treasurer". It will be further noted that the bond

indemnifies Groesbeck against loss and guarantees any and all deposits made, without qualification or limitation save only as to the penalty of the bond. The significance of this is that the bond stands behind not any particular part of Groesbeck's deposit but behind all of it so as to be guaranty against ultimate loss on account of the deposit—a guaranty of the last $125,000.00 or any part thereof. When it accepted Groesbeck's deposit, certainly the bank agreed with the treasurer to pay back the entire deposit, and the National, by its agreement with Groesbeck—its depository bond—guaranteed the performance of the bank's agreement.

In violation of the plain terms of the surety's contract with Groesbeck the Circuit Court has held that although Groesbeck has not yet been paid in full the National is entitled to have its claim allowed and to receive dividends in competition with Groesbeck at his loss and expense and is entitled to the immediate payment by the receiver of back dividends amounting to 60 per cent.

Decision Conflicts With Other Circuits

This decision of the Eighth Circuit Court of Appeals is squarely in conflict with the decision of the Fourth Circuit Court of Appeals in the case of Maryland Casualty Company v. Fouts, Lacy, State Treasurer of North Carolina, 11 Fed. (2d) 71, and the decision of the Sixth Circuit Court of Appeals in the case of Springfield National Bank et al., v. American Surety Company of New York, 7 Fed. (2d) 44, and the decision of the Ninth Circuit Court of Appeals in Fidelity and Deposit Co. v. Robinson, 7 Fed. (2d) 571.

In the case of Maryland Casualty Company v. Fouts, et al., supra, the Maryland Company executed as surety for the bank a depository bond to the State Treasurer of North Carolina, in the sum of $50,000.00, the bank execut-

ing an indemnity agreement. At the time of the failure of the bank it was indebted to the State Treasurer in the sum of $89,579.14. The terms of the National Surety Company's bond are stronger and more comprehensive than those of the Maryland Casualty Company's bond, the essential terms of which are set out in the opinion. Both bonds are general and comprehensive and are without any limitation save as to penalty and in each instance guarantee the whole of the public official's deposit. The two cases cannot be distinguished. After paying the penalty of its bond the Maryland Company brought suit claiming that by reason of such payment it was subrogated to the claim of the State Treasurer of North Carolina to that amount and also "that it was entitled to dividends as any other creditor of the bank, upon the $50,000.00" so paid by it for the bank. There, as here, the treasurer had not been paid in full; there, as here, while the surety company had paid the penalty of its bond the whole debt due the treasurer had not been discharged. The United States District Court, in that case, held "that the plaintiff is not entitled to recover from the defendant J. E. Fouts, receiver of the Peoples' National Bank of Salisbury on its indemnity agreement with the said bank." The Circuit Court of Appeals of the Fourth Circuit affirmed the decision of the District Court upon the theory primarily that to permit the Maryland Company to recover would be to allow that company to violate the very terms of its own contract.

While the surety in that case relied upon the right to subrogation, it nevertheless pleaded and relied upon its indemnity agreement, and the question of its right to recover dividends based thereon was squarely raised by the surety and squarely decided by the court.

The court held that while the surety's bond was in the sum of only $50,000.00, it nevertheless stood behind the en-

tire deposit. The court developing the point a step further held that until the entire deposit was paid, the agreement of the surety company remained unfulfilled and outstanding and *there was no ground* upon which it could participate in the assets of the bank. The point is so pursuasively developed and clearly stated by the court that we submit from its decision the following:

> "To allow the appellant to assert such indebtedness, based upon its alleged claim as a creditor for the amount paid by it under its bond of indemnity to the State, and claimed to be in full of such liability, would be to permit the assertion of a claim in behalf of a guarantor against those it undertook to indemnify, in advance of the latter being paid in full the amount due them. . . .
>
> "As long as the undertaking on account of which the security was given remains unpaid, in whole or in part, the one giving the indemnity cannot invoke the aid of a court of equity to save it from the consequence of having to make payments on account of the obligation it gave, by decreeing to it dividends from the estate of the insolvent bank, and leaving the debts of such institution indemnified against unpaid. To allow this to be done would operate most unfairly against the state, whose debt was secured. . . .
>
> "The fact of the indebtedness, on account of which the surety was given, not having been paid in full, alone required the denial of the relief praved for, as the right of subrogation cannot be availed of to collect an indebtedness by one himself liable for the debt, and which obligation he has not met. The decisions of the courts of last resort, federal and state, and the text writers of the highest standing, have given full and frequent consideration to this subject, and with one accord they sustain the views herein given. . . .
>
> "Appellant's position is purely *contractual*, and until it has met its *liability* and the state has been paid in *full*, as well for the excess deposits of $39,579.14, as for the *penal amount* of the indemnity bond, it has no right, by subrogation *or otherwise*,

in a case like the present one, to call upon others to share its burdens."

In the foregoing the court pertinently points out that the surety, while the debt it guaranteed remains unpaid, cannot be decreed dividends from the estate of an insolvent bank, since to just the extent a court of equity allows it to receive such dividends the court saves it, the surety, "from the consequence of having to make payments on account of the obligation it gave". In other words, the surety is not really suffering the penalty it contracted to pay if, while the obligation it indemnified remains unpaid, it can pay that penalty with one hand and receive back dividends to diminish that penalty with the other hand.

In the case of Springfield National Bank, et al., v. American Surety Company of New York, supra, the surety company had executed a bond to the State of Ohio as surety for the Springfield National Bank to secure a state deposit in the bank of $50,000.00. About a month later it became surety on another $50,000.00 bond executed by Penfield, cashier of the bank, for the faithful performance of his duties as such officer. The bank failed as a result of frauds of Penfield and a receiver was appointed. After the appointment of the receiver the state filed its proof of claim, which was allowed, and a certificate of allowance issued to the state and by it assigned to the surety upon payment by that company of its full liability on the depository bond. Subsequently the receiver for the bank paid to the surety company about $21,000.00 on the claim of the state.

A reading of the decision discloses that the state's claim was paid in full by the surety company's payment of the penalty of its bond. The question of whether the surety had, therefore, fully discharged its contract to the state was not involved in this case, and the question was squarely

presented as to whether or not in a suit by the receiver against the surety on the bond executed by it for Penfield the surety could set off against that liability the difference between the amount received by it on the state's claim, to-wit, $21,000.00, and what it paid to the state, to-wit, $50,000.00, as a debt due from the bank. There, as here, the bank in its application for a bond had agreed to "indemnify and keep indemnified" the surety against any loss sustained on account of the suretyship and that contractual right was there, as here, asserted. If, as held by the Eighth Circuit Court the surety company is by virtue of such indemnity agreement entitled to share with other common creditors in dividends paid, then, clearly, to that extent the surety was entitled to a set off against its liability to the bank under the bond for Penfield but the Sixth Circuit Court of Appeals denied any such right and in disposing of the asserted claim said:

> "The bank was legally bound to repay on demand the deposit made by the state. The surety obliged itself to pay if the bank should default. To permit the performance of that obligation to defeat a separate surety obligation *would eventuate in an unfair distribution of the bank's assets among its creditors.* A majority of the court think the case is within the principle announced in the Wooldridge Case."

We shall have occassion to refer to the Wooldridge Case decided by the Supreme Court of the United States hereafter.

The foregoing case by the Sixth Circuit Court of Appeals is of particular interest because it discloses the unwillingness of that court to permit any such recovery under the indemnity agreement as is here contended for even where the entire contract of the surety company had been discharged and not simply where the penalty of its deposi-

tory bond had been paid. It is further to be noted that the Supreme Court of the United States refused to grant a petition for a writ of certiorari in that case. See 269 U. S. 578; 70 L. ed. 421.

The facts in the case of Fidelity and Deposit Company of Maryland v. Robinson, 7 Fed (2d) 371, decided by the Ninth Circuit Court of Appeals, are practically identical with those of the preceding case and the right of set-off is likewise denied.

An analysis of the foregoing decisions of the Fourth, Sixth and Ninth Circuit Courts of Appeals discloses that the right to recover dividends by virtue of the indemnity agreement is denied by the Fourth Circuit Court of Appeals on the theory that to permit such recovery would violate the terms of the surety's contract; is denied by the Sixth Circuit Court of Appeals on the theory that to permit such recovery or set-off "would eventuate in an unfair distribution of the bank's assets among its creditors"; and by the Ninth Circuit Court of Appeals upon the authority of the decision by this court in the case of

United States Fidelity & Guaranty Company v. Wooldridge, 268 U. S. 234, 69 L. ed. 932.

It is submitted that the decisions in the two last cited cases by the Sixth and Ninth Circuit Courts of Appeals are as clearly in point as that by the Fourth Circuit Court of Appeals, for the reason that no distinction can be made between refusing to allow the surety's claim as such and refusing to allow a credit by way of set-off therefor.

We have reviewed the foregoing decisions by the Fourth, Sixth and Ninth Circuit Courts of Appeals at some length, both because they disclose what we conceive to be the correct legal principle here applicable and also because they serve to show the conflict between the holding of the Eighth

Circuit Court of Appeals in this case and the holdings of the Fourth, Sixth and Ninth Circuit Courts of Appeals.

This court, in Rule 35, paragraph 5, of the Revised Rules effective July 1, 1925, has set forth the character of the reasons which, while neither controlling nor fully measuring the court's discretion, will, nevertheless, be seriously considered in applications for writs of certiorari. The court has there indicated that the two following grounds, among others, will be considered:

> 1. Where a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter.
>
> 2. Where the Circuit Court of Appeals has decided an important question of general law in a way probably untenable or in conflict with the weight of authority.

We have shown the existence of a square conflict between the holding in this case and that of three of the other Circuit Courts of Appeals.

Moreover, the decision of the only state supreme court which has passed directly upon all the points involved in this case is in harmony with the opinions of the Circuit Courts of Appeals upon which we rely and against the opinion of the Eighth Circuit Court of Appeals.

The Supreme Court of Michigan in

Zimmerman v. Chelsea Savings Bank, 125 N. W. 424.

had before it a case involving all of the points which have been relied upon by the National, both in this and in the former case. In that case the American Surety Company as surety relied upon its contract of indemnity, as does the National in this case. It filed its claim in the sum of $50,143.40 with the receiver, and asked the court to direct the

allowance thereof and to order the payment of dividends thereon. There, as here, the surety had written a depository bond for the bank and the state treasurer relying thereon had deposited state funds therein. The bank's application for the bond contained an indemnity agreement substantially similar to that running from the bank to the National in this case. When the bank failed it had on deposit funds of the state amounting to $685,387.70, to secure which the state held six depository surety bonds, aggregating the sum of $200,000.00, included among which was the American Surety Company's bond of $50,000.00. The surety company upon the demand of the state paid the face of its bond with interest, and in its complaint in intervention urged as its fourth ground of recovery "*that the agreement of indemnity given by the bank to the surety company took effect as of its date immediately upon payment of the bond and that such agreement entitled the surety to stand as a creditor of the bank and receive its share of any dividends paid.*" In disposing of this and other claims made, the court pertinently observed:

> "The condition of the bond is that if the said bank shall, in accordance with said contract, safely keep and reimburse and pay over upon demand all moneys belonging to the said state of Michigan deposited with it by said State Treasurer in accordance with said contract, etc., 'then this obligation to be void, otherwise to remain in full force and effect.'
>
> "The language employed is not ambiguous; the ordinary meaning thereof is not doubtful. In terms the liability of the surety *is that of the principal* limited only by the penalty of the bond and by provision for paying no more than such proportion of the total loss sustained by the treasurer of the state as the penalty of this bond bears to the total of the penalties of all bonds furnished by said bank as principal in favor of said state treasurer. . . .

The debt due to the state from the bank is the sum of all deposits. The bank, the principal in the bond, has not paid the debt and upon its failure so to do the surety became at once liable to pay the amount which it had agreed to pay. The surety has paid. It paid the entire penalty of the bond because the debt due to the state from the bank exceeded in amount the aggregate of the penalties of all bonds.

. . . We reject the theory that a particular bond furnished by a depository of state funds, conditioned like the bond in question here, should be treated as securing a particular deposit of funds. And this as well when the state has the 'good and ample security' which the intervener says it should have taken as when it has not. The deposits in the Chelsea Savings bank were made, generally, from time to time, and were from time to time withdrawn. That this would be the course of affairs was to be expected, and that it was so understood is evident. All security was given and accepted for all the deposit, whatever the amount of the deposit might be. If intervener secured and intended to secure any particular deposit of $50,000.00 it had no occasion to provide that it should pay no greater part of any loss than the proportion of the penalty of its bond to the total penalties of all bonds. *Its undertaking is that its principal shall repay all moneys deposited and it must be construed as a security for the whole debt.* It is conceded, and the authorities cited by counsel for the intervener sustain the concession and the general rule, that in such a case the guarantor is not entitled to a share of the dividends which are declared and paid in reduction of the whole debt. 1 Brandt, Suretyship and Guaranty (3d Ed.) sec. 277; Ellis v. Ammanuel, Law Rep. 1 Exchcq. Div. 157; Dumont v. Fry (C. C.) 14 Fed. 293."

ANALYSIS OF CASES RELIED ON IN CENTROPOLIS BANK CASE

Since the Circuit Court of Appeals allowed the question of the respective rights of the parties herein to rest upon a reference and adherence to its opinion in the Cen-

tropolis Bank case, it becomes necessary to consider and analyze the authorities therein relied upon. As we understand it, the Circuit Court of Appeals in the Centropolis Bank case, in determining the contractual relationship of the parties and in construing the surety's bond and especially in determining the scope of its guaranty, elected, in preference to the decisions of the Fourth, Sixth and Ninth Circuit Courts of Appeals heretofore referred to, and the decision of the Supreme Court of Michigan, and numerous other decisions, federal and state, supporting the basic reasoning upon which these decisions are founded, to follow and rely upon the following cases:

American Surety Co. v. National Bank of Barnesville, 17 Fed. (2) 942;

U. S. Fidelity & Guaranty Co. v. Carnegie Trust Co., 164 N. Y. S. 92, 117 N. E. 1086;

In Re Daily and Ivins (cited by the District Court of New Jersey, not officially reported).

The case of

American Surety Company of New York v. National Bank of Barnesville, supra.

was decided by the District Court for the Southern District of Ohio. There the bank, prior to its failure, became the depository for school funds and in order to secure such deposit executed a bond, with the American Surety Company as surety, to the Board of Education in the sum of $6,000.00. The application of the bank contained the usual indemnity agreement in favor of the surety company. At the time of its failure the net indebtedness to the Board of Education was $16,030.47. Upon the bank's failure the surety company paid the full amount of its bond, $6,000.00, to the

Board of Education and thereupon filed its bill in equity asserting rights, both by way of subrogation and indemnity.

In its opinion, the court rather elaborately discusses the question of subrogation and refers to numerous decided cases on that point and then concludes that since the whole debt of the Board of Education has not been paid the surety company is not entitled to any rights by way of subrogation. It then proceeds, in the face of such a conclusion, to direct the receiver to deduct from the School Board's claim an amount equal to the penalty of the surety's bond and to allow the surety's claim for that amount, and to further direct the receiver to recover from the School Board "any and all sums paid to it as dividends upon the said amount of $6,000.00." Here then we have the anomalous situation of a court deciding that the surety could not enjoy rights by way of subrogation as a matter of law and then proceeding as a matter of fact to allow and direct that it be given such rights.

The decision of the Ohio District Court is squarely against the previous holding of the Eighth Circuit Court of Appeals in the first case between the parties to the instant suit, which denied the National any rights by way of subrogation; and which refused to in any manner reduce Groesbeck's claim or the dividends he looked to for its payment until he was fully reimbursed.

Not only is the opinion of the Ohio District Court in the Barnesville case at variance with the previous holding of the Eighth Circuit Court of Appeals in the first case between these parties, but also it is contrary to the uniform holding of the courts and is clearly erroneous. The relief granted in that case was by way of subrogation and not

indemnity. Therefore the case does not support the holding here complained of.

The case of

United States Fidelity & Guaranty Co. v. Carnegie Trust Company, supra,

likewise does not support the proposition for which it is cited by the court in its opinion in the Centropolis Bank decision, but in its result is favorable to the contention of the petitioners herein.

There the surety brought suit against the superintendent of the defunct bank, asserting that since it had paid the penalty of its depository bond to certain bankrupt creditors of the bank whose funds had been deposited there, it was entitled either to subrogation to the rights of such creditors or to have its general claim *based upon its indemnity agreement* allowed. The lower court refused to allow the surety company to share in the dividends to the injury of the bankruptcy creditors *on the ground that such action would violate the spirit of the guaranty.* On this specific point the court, at page 93, uses the following language:

> "It is not necessary to determine whether or not the claim of the plaintiff can be allowed in such a way as to *diminish* the dividends which would otherwise accrue to the bankruptcy creditors. It is contended that such effect cannot be given, *because it would violate the spirit of the guaranty.* The Special Term has so held, and has made *full provision for the protection of the bankruptcy creditors in the judgment appealed from, and from this judgment the plaintiff has taken no appeal.*"

In Re Dailey and Ivins. This is a case involving the proof of claims in a bankruptcy matter and this Court has held such a case is not in point in a case involving proof of claims against a receiver of a national bank.

> "The bankruptcy rule which requires the holder of collateral security to exhaust it and credit the proceeds on his claim, or else to surrender it, before he can prove his claim, is not adopted for national banks by U. S. Rev. Stat. 5236, providing for a ratable dividend on claims proved or adjudicated." Merrill v. National Bank of Jacksonville, 173 U. S. 131; 43 L. Ed. 640.

Section 58 (b) of the Federal Bankruptcy Act provides that secured claims shall not "be counted in computing either the number of creditors or the amount of their claims unless the amount of such claims exceeds the values of such securities and then only for such excess."

In the Dailey and Ivins case, the City of New York's claim was, to the amount of the surety bonds, a secured claim. As to that amount it could not prove its claim in bankruptcy nor could it draw dividends on the secured part of its claim. This, we submit, clearly distinguishes the case from the case at bar and discloses that it has no application here.

We urge, therefore, that the three cases cited in the court's opinion as countervailing Maryland Casualty v. Fouts and Zimmerman v. Chelsea Bank wholly fail, upon analysis, to have any such countervailing force. The Carnegie Trust case, by express reservation, leaves out of consideration the point to which it was cited by the National and an examination of the dissenting opinion discloses that the ultimate effect of the case is in our favor and against the National. The Barnesville case is one wherein subrogation and not indemnity is actually granted contrary to the opinion of the very court which granted it. The Dailey-Ivins case is a bankruptcy case governed by rules peculiar to bankruptcy practice.

II.

DECISION OF EIGHTH CIRCUIT COURT OF APPEALS ON IMPORTANT QUESTIONS OF GENERAL LAW UNTENABLE AND IN CONFLICT WITH GREAT WEIGHT OF AUTHORITY BECAUSE:

(A) Decisaon Violates the Plain Terms of the Contract Between the National and Groesbeck.

(B) National Secured Final Amount Left Unpaid by Bank.

(C) Decision Misapplies the Doctrine of Relation Back.

(A.)

To allow the National to recover anything on its indemnity agreement until Groesbeck has been made whole is to violate the plain terms of the National's guaranty to him and to reduce its liability as guarantor of his entire deposit, a liability which continued "as well after as before" the payment of the penalty of its bond.

Unquestionably the National might have become surety for the bank upon the condition that the debt it guaranteed should not exceed the penal sum of its bond or that only so much credit should be extended to the bank as should not exceed the penalty of its bond. But that is not the character of the National's bond. It involves no assumption to say that the National's bond is without limitation save as to its penalty. It guaranteed Groesbeck's entire deposit. That is precisely what the Eighth Circuit Court of Appeals held in the first case between these parties.

Upon what theory then in the face of such an outstanding and as yet unperformed contract can the National, with Groesbeck still unpaid, be allowed to compete with Groesbeck in receiving dividends from the bank? Certain-

ly the National cannot, by virtue of an independent agreement with the bank to which Groesbeck was a stranger, assert rights to any moneys by way of dividends paid by the receiver until Groesbeck has been paid in full and until the obligation of the National's bond which stands behind his entire debt or deposit has been fully performed. And yet this was the very ground asserted and relied upon by both court and counsel for allowing the National to escape from the plain terms of its contract with Groesbeck.

The National seeks to write into its depository and indemnity bond to Groesbeck the provisions of a collateral indemnity which it took from the bank and to which Groesbeck is an entire stranger. That it cannot do. The fundamental difficulty which confronts the National in seeking to have its indemnity claim allowed and dividends paid thereon is *that it comes before the court with an outstanding contract of indemnity and guaranty to Groesbeck as yet unperformed and without prospect of full performance.*

The basic error in the decision of the Circuit Court of Appeals in the Centropolis Bank case which is made controlling here, is that it wholly disregards and totally overlooks this contractual barrier to the National's right to recover. It was this contractual obligation, held not to have been performed by the mere payment of the penalty of the bond, that had controlling consideration with the Fourth Circuit Court of Appeals and the Supreme Court of Michigan.

In the case of

Maryland Casualty Company v. Fouts, supra,

the Fourth Circuit Court of Appeals, in refusing to allow the surety's claim based upon its indemnity agreement, said:

> "Appellant's position is *purely contractual* and until it has met *its liability* and the state *has been paid in full as well* for the excess deposit of $39,579.14 as for the *penal amount* of the indemnity bond, it has no right of subrogation *or otherwise* in a case like the present one to call upon others to share its burdens."

It was this contractual liability on the part of the surety company which the Supreme Court of Michigan had in mind in the case of Zimmerman v. Chelsea Bank, supra, when it denied the right to recover on the indemnity agreement there asserted and held that the surety company by paying the penalty of its bond had not discharged its full contractual obligation but that *"its undertaking is that its principal shall repay all moneys deposited and it must be construed as a security for the whole debt."*

Precisely on this point of contract, although the surety had paid the penalty of its bond, did the New York court in the case of U. S. Fidelity & Guaranty Co. v. Carnegie Trust Co., supra, refuse to allow the surety's claim based upon its indemnity agreement, without protecting the surety's obligee, since to do otherwise "*would violate the spirit of the guaranty.*"

Upon this contractual ground most courts, Federal as well as State, have refused to permit the surety, whose guaranty was without qualification or limitation save as to penalty, to enjoy subrogation until the obligee has been paid in full. The rulings in the subrogation cases to which we will refer are based upon the same construction of the surety's contract as we contend for here as barring any recovery by indemnity.

In each of the following cases the surety, having paid the penalty of its bond sought subrogation before its obligee had been paid in full. In each case the surety was met by the court with the answer that the payment of the full pen-

alty of its bond was not a complete performance of its contract.

> "The extent of subrogation depends upon the character of the bond. Unquestionably one may become a surety under a condition that the debt thereby guaranteed shall not exceed the penal sum, or that only so much of the credit to be extended to the principal as shall not exceed the penalty of the bond shall be within its protection. The surety under such a bond could become subrogated to so much of the claim against the principal, even though the creditor were thereby prevented from receiving the balance of his claim in full. We find nothing, however, in the statute that would authorize the court to accept a bond so limited. While the amount may be increased as the court may from time to time find it proper, *the object of the statutory requirement is to secure protection not for a part but for all depositors, and not for a portion but for the entire amount of their deposits; that is, for so much thereof as they may be unable to realize from the funds of the bank itself.* Under such a bond, there is no right of subrogation until the creditors shall have obtained from the principal or the surety payment not merely of the penalty but of the debtor's entire obligation."
>
> Illinois Surety Company v. U. S., 226 Fed. (7 C. C. A.) 665,

> "Was the guaranty of thewhole debt, with a limitation on the liability of the surety? *If so, the principal may retain all the dividends, and hold the surety for the residue of the debt up to the extent of the bond. Or, was the guaranty of a limited part of the debt? If so, the dividends are to be applied to the whole debt and the surety is entitled to a ratable deduction for the sum covered by the bond.* This distinction, although somewhat elusive, rests upon a logical basis, namely, *the intention* of the parties as gathered from the obligation.
>
> "*The only limitation in the bond in suit is in the amount of the penalty.* The condition, for a breach of which the penalty becomes chargeable to the sure-

ty, is the bank will repay to the plaintiff all moneys now deposited, or which may hereafter be deposited, upon call. There is no express limitation as to the amount of the deposits, and there is no ground for the inference that the deposits should not exceed the penalty of the bond. *The condition of the bond is the repayment to the plaintiff of all its deposits and the penalty becomes effective to the extent of the amount received thereof* unless the condition is fulfilled.

"The language of the bond, in connection with the admitted fact that the amount of moneys on deposit with the bank at the time of the execution and delivery of the bond was largely in excess of the penalty of the bond, indicates that the true engagement of the parties was to secure the plaintiff *for any unpaid balance to the extent of the penalty of the bond* in case of the insolvency of the bank."

Buffalo, etc. Co. v. Title Guarantee & Trust Company, 99 N. Y. S. 883.

"In the present case Bacon was not liable for the debt beyond the amount of his bond but the obligation to pay the bond was conditioned that the bank should 'well and truly keep all sums of money deposited by the city and pay over the same and each and every part thereof' so that the bond was an obligation limited to $25,000.00 but conditioned that the bank should well and truly keep all sums of money and pay over the same and each and every part thereof. *The full amount* of the bond has been *discharged by the surety but the condition expressed has not been complied with.* The bank has not well and truly kept all sums of money deposited with it and paid over each and every part thereof. *The principal liability still exists in part, though the surety has paid the penalty of the bond. This, however, did not satisfy the creditors' demands against the principal, which was to determine the liability on the bond. The amount of the liability is satisfied so far as Bacon is concerned but the cause and determination of that liability is not satisfied in full.*"

Knaffl v. Knoxville Banking and Trust Co., 133 Tenn. 655; 182 S. W. 232.

"The rights of the creditor in the mortgaged property had not been extinguished by a payment of the whole debt. The payment of the whole debt for which the surety is liable is essential to subrogation. *If the surety, upon making a partial payment, became entitled to subrogation pro tanto, and thereby became entitled to the position of an assignee of the property to the extent of such payment, it would operate to place surety upon a footing of equality with the holders of the unpaid part of the debt, and, in case the property was insufficient to pay the remainder of the debt for which the guarantor was bound, the loss would logically fall proportionately upon the creditor and upon the surety. Such a result would be grossly inequitable.* Yet this is in effect the result of the contention urged. The equity of subrogation does not arise from the mere obligation to pay; it springs alone from payment. The liability of the surety for the remainder of the debt continued as well after as before such payment, and until the entire debt is paid the surety has no such equity as will entitle him to the active aid of a court of equity."

Columbia Finance & Trust Co. v. Kentucky Union Ry., 60 Fed. (6 C. A. A.) 794.

"Thus it is seen that the condition of the bond was to secure the return of 'any and all sums deposited' with the bank, and not, as counsel would have it, of a sum equal to the amount of the bond.

"By the said argument of counsel the object of giving the bond would be defeated. *The situation was that the plaintiff board stood in no need of a bond for the return of whatever part of the deposits it was sure to recover from the bank either as a going concern or as a concern in liquidation;* it stood in need of a bond for that part which would be lost unless a bond was taken; that is to say, for that part not recoverable from the bank. The bond was given to supply that need. *According to the argument of counsel, it is not the balance endangered*

by the possible failure of the bank that is to be secured by the bond, but some part not in danger of being lost, so that, after the surety company has paid this part not in danger of being lost, it is to be entitled to be reimbursed by the bank. The argument will not hold water; it but renews the question long ago settled in the civil law as to what is to be the effect or operation of a bond given to secure part of the debt either already created or to be created.

"We conclude that the surety company was not entitled to come in competition with plaintiff board against the dividends to accrue from the liquidation of the bank for the reimbursement of the amount paid on the bond."

Board of Health v. Teutonia Bank & Trust Co., 68 So. (La.) 749.

"The right of a surety on a bond to be subrogated for the obligee in a right of action against one wrongfully causing the liability is founded on payment by the surety to the obligee, and it does not come into existence except upon full payment of the loss indemnified against. This is because subrogation is of an equitable character, and the surety cannot be permitted to take away from the obligee, to the latter's prejudice, securities or rights in which he is still beneficially interested. Sheldon on Subrogation, Sec. 127; Musgrave v. Dickson, 172 Pa. 629, 632, 33 Atl. 705, 51 Am. St. Rep. 765. *In this case, the loss of the state was $3,000, and the guaranty company paid it in full, but the loss of the city was $8,700, and the guaranty company has paid on account of it only* $5,700 (*as above estimated*). This leaves the city with an unpaid claim of $3,000 against the clerk and the clerk's fund, and the right of action which the city originally had against the bank it was entitled to enforce and collect and to apply the full sum collected upon its claim. *The city thus had, in a very proper sense, two securities to which it might resort and upon both of which it might realize in full until its whole claim was satisfied; these securities being its right of action against the bank and its claim against the guaranty company on the bond.*"

United States Fidelity & Guaranty Co. v. Union Bank & Trust Co., 228 Fed. (6 C. C. A., 1915) 448.

Just so in this case, the National cannot be permitted to take away from Groesbeck a part of the assets which it, under this rule, guaranteed would remain available to him. To do so would prejudice him in the enjoyment of property in which he is still beneficially interested. So, too, in this case Groesbeck, "in a very proper sense," had two securities to which he might resort—his claim against the bank and his claim against the National. The National cannot deprive him of recourse to either of these sources of relief until his claim is paid, for until that time the obligations of the bond remain outstanding and undischarged.

Finally, how can the present decision of the Eighth Circuit Court of Appeals be reconciled with the following statement in its former opinion in this same matter:

> "Until the creditor is wholly satisfied there ought to be and can be no interference with his rights and his securities which might, even by bare possibility prejudice and embarrass him in any way in the collection of the residue of his claim. (New Jersey, Etc. R. R. v. Wartendyke, 27 N. J. Eq. 658.)"
>
> "The rule deducible from the cases is, that till the creditor is paid in full, no right of subrogation exists in favor of sureties who pay a part of the debt. In short, the creditor may insist on getting his full pound of flesh before others are allowed to sit at the banquet board."

To the same effect are the following:

> People v. Peoples Bros., Inc., 254 Fed. 489;
> Fidelity & Deposit Company of Maryland v. Wilkinson, 69 So. 865;
> Dickson v. Bailey, 33 at 705;
>
> Bank of Fayetteville v. Lorwein, 88 S. W. 919;
> McKenna v. Corcoran, 61 Atl. (New Jersey Eq.) 1026

Dickson v. Bailey, 33 At. 705;
New Jersey Midland Railway Company v. Wortendyke, 27 N. J. Equity, 658.
Opp v. Ward, 24 N. E. 970;
Featherstone v. Emerson, 14 Utah 12.

As heretofore stated we must in this brief analyze the reasoning of the court in the Centropolis Bank case since the decision in that case without further comment was made controlling in this case upon the matters now under consideration. The court in the Centropolis Bank case inferentially sets aside the cases upon subrogation with the observation that it is concerned with the surety's rights not to subrogation but to indemnity. That distinction does not, however, answer either in part or in whole the argument upon which the foregoing subrogation cases are decidided, to-wit, that where the surety has not expressly limited its guaranty to the penalty of its bond although its requirement to pay may be limited by such penalty, its guaranty remains outstanding and remains a continuing contractual obligation after the penalty has been paid and until the obligee's debt or deposit is paid in full. The contract of the surety is identical whether analyzed and determined in a subrogation case or an indemnity case. Since the vital question is what is the surety's contract, what are the surety's obligations, and since these questions are analyzed and decided in the subrogation cases, the court does not with good reason in the Centropolis Bank case dispose of such subrogation cases by asserting this is a case of indemnity and not one of subrogation.

The question here is what is the contract between the National and Groesbeck? Once that is clearly determined this case is easy of solution. If we read the decisions correctly the National's contract is not simply an agreement to pay the penalty of its bond. It is also a guaranty of

Groesbeck's entire deposit. The latter obligation and the legal liability in connection therewith continued as well after as before the National paid the penalty of its bond. This has been repeatedly held in numerous decisions both State and Federal. It does not militate against the authorities here cited that some of them involve questions of subrogation as well as of indemnity. The National's contract is the same and so is every other surety company's contract the same whether that contract is reviewed in a subrogation or in an indemnity case. Insofar as the subrogation cases cited go to an analysis of what the surety cimpany's contract is and point out that such contracts embrace not simply an obligation to pay the penalty of the bond but also include a guaranty of the entire deposit, it is submitted they are in point and are entitled to the serious consideration of this court.

The authorities are overwhelming to the effect that a contract such as the National has executed is not discharged by mere payment of the penalty of the bond and that, in the language of the Sixth Circuit Court of Appeals in Columbia Finance & Trust Company v. Kentucky Union Railway, supra, "the liability of the surety for the remainder of the debt continued as well after as before such payment."

It is submitted, therefore, that to permit the National to recover under its indemnity agreement in this case does violence to the National's contract with Groesbeck guarantying the whole of his deposit and agreeing in effect that until he has been made whole the National will stand back and claim nothing to his detriment, but on the other hand will permit him first to receive all dividends which the bank can pay *and that it, the National, will thereafter make up any deficiency to the limit of the penalty of its bond.*

It is precisely this contractual ground which the Cir-

cuit Court overlooked in its decision in the Centropolis Bank case. The court in that case used the following language:

> "We think that a construction of the bond in the instant case in accordance with the above rule compels the conclusion that it was the intention of all of the parties to the contract that the Surety Company should be liable to the county for all of the principal of the county's deposit, together with interest thereon, up to and including, but not exceeding, the sum of $50,000.00 and that the recital in the bond that the penal sum thereof is $50,000, just as effectually limits the language of the condition as if there had been written into the language of the condition itself the words 'up to and including but not exceeding $50,000.' It is true that the liability under the bond was not limited to any particular portion of the whole deposit. *In that sense, the bond was security for the whole deposit, and for that reason the right of subrogation* does not exist, but the maximum amount for which the Surety Company could be held liable thereunder was expressly fixed at $50,000. The Surety Company has discharged that liability by payment in full. The county has received all that it contracted for from the Surety Company. How then can the county say that the spirit of the guaranty will be violated? *We find nothing in the language of the bond which justifies the contention that the claim of the county upon its contract of deposit should be given any priority over the claim of the Surety Company upon its contract,*"

This reasoning and particularly the concluding sentence fails to take account of the contractual barrier which has prevented the courts in all of the foregoing cases from allowing the relief to the sureties there which was allowed in the Centropolis case and which has been granted the National here. If this contractual barrier does not exisit in the present case and stand as an obstacle to the National's recovery then it is submitted that all of the foregoing cases discussed herein have been incorrectly decided.

If the National's bond guaranteed Groesbeck's entire deposit as a matter of specific contract then certainly until that specific contract has been carried out and Groesbeck's entire deposit has been paid the National is not entitled to receive anything either by way of subrogation or of indemnity.

Either the bond of the National was security for Groesbeck's whole deposit or it was not. If that bond was not security for the whole deposit but only for $125,000.00 of said deposit, then the Circuit Court in the previous case should have allowed the National to enjoy subrogation to that extent since by paying the $125,000.00 it would have paid the entire debt for which its bond was security.

If, on the other hand, the bond was, as the Circuit Court previously held, security for the whole deposit so as to prevent subrogation then that guaranty in the National's bond likewise bars it *as a matter of contract* from receiving anything by virtue of its indemnity agreement, until Groesbeck's debt has been paid in full. The same principle of contract law and the same obligation of contract is the effective bar to the surety's recovery in each instance and this, as we understand it, is the reasoning back of the decision by the Fourth Circuit Court of Appeals in the case of Maryland Casualty Co. v. Fouts and of the Supreme Court of Michigan in the case of Zimmerman v. Chelsea Savings Bank. We submit that the first decision of the Circuit Court *settled the contract question. That decision should have been held to be decisive of the present litigation, and therefore, when the Circuit Court permitted a recovery by the National under its indemnity agreement it in effect overrules its previous decision and robs the previous decision of the sound basis upon which it rests, to-wit, the proposition that the National's bond as a matter of contract guaranteed and stood behind the treasurer's entire deposit.*

The limited rights which the National has in this case spring from payment. It could enjoy no rights by way of subrogation without payment; it could enjoy no rights by way of indemnity without payment. The authorities are all to the effect that even if the National had secured no express contract of indemnity from the bank the law, upon payment, would imply such an agreement on the part of the bank. Can it possibly be that the National, seeking relief by subrogation, can be successfully confronted by the barrier of its outstanding and unperformed guaranty of Groesbeck's whole deposit, and that it can then pursue indemnity and avoid this same contractual barrier? Why should the contractual ground not be as effective and complete an obstacle to its recovery in the one case as in the other?

The same reasons and the same motives have operated in the law to raise up and confer upon a surety the rights of indemnity and the rights of subrogation. Both rights are conferred upon the surety by operation of law when to withhold such rights would be to defeat the ends of justice. The same principle which impels the allowance of recovery by way of indemnity or by way of subrogation to promote the ends of justice impels with equal vigor the denial of recovery on either ground when the recovery on either would obstruct the course of justice. A situation which has already required the court to withhold subrogation must of necessity require it to withhold indemnity.

(B.)

It is the Final Amount Left Unpaid by the Bank Which the National Secured. The National Agreed to Lose $125,000.00 Before Groesbeck Should Lose Anything. It Violates That Agreement If It Receives Anything at His Expense From the Funds of the Bank Before He is Made Whole.

As pointed out, a bond such as the National's bond, the guaranty of which is without limitation or qualification except as to its penalty, stands behind the entire deposit of the obligee. This principle is erroneously given only qualified recognition by the Eighth Circuit Court of Appeals in the Centropolis Bank case.

The National's bond stands not behind any particular part of Groesbeck's deposit, but behind all of it so as to be a guaranty against ultimate loss—a guaranty of the last $125,000.00, or any part of it. Can it be that under its bond the National may recover back out of the assets of the bank—and out of the very money that Groesbeck placed in the bank—in excess of $75,000.00 while Groesbeck, according to the record, is still out of pocket on account of his deposit many thousands of dollars? Such is the result if the decision of the Circuit Court of Appeals is allowed to stand. Groesbeck had—and still has—the right to look both to the assets of the bank and the security of the National's bond for the recovery of his entire deposit. The authorities clearly establish that it was his right to receive dividends upon his deposit from the receiver as long as dividends were available, and then to call upon the National for the residue of his debt or deposit up to the full penalty of its bond.

The fact that in this case the National paid Groesbeck

the penalty of its bond before the receiver ceased to pay dividends does not entitle the National to compete with Groesbeck in receiving dividends from the bank. Groesbeck did not need protection against loss of that part of his deposit which the bank could repay by way of dividends in the event of failure.

By its bond the National agreed to stand between Groesbeck and ultimate loss on his deposit. As long as any part of his deposit remains unpaid Groesbeck holds the National's agreement to protect him to the extent of $125,000.00. If the National is now allowed to recoup itself from the funds of the bank the inequity of such result will be apparent from the fact that the money which it receives will be taken out of the fund to which Groesbeck was entitled to look and the integrity of which the National guaranteed. As long as Groesbeck is unpaid to the extent of $1.00 the National, by the terms of its bond, is required to stand back and withhold interference with any of the securities to which Groesbeck might resort. Otherwise the National does not lose the $125,000.00 as it has agreed, and just to the extent to which it minimizes its loss at the expense of Groesbeck it is relieved from the obligation of its contract.

There are many cases to support this contention, and except for the decision of which we now complain we know of no respectable authority to the contrary.

Observe

Knaffl v. Knoxville Banking & Trust Co., supra wherein the Supreme Court of Tennessee says:

> "Had it chosen to do so the city might have deferred action on the bond until it had received the last dollar from the receiver and then it could sue the surety on the bond and recover the full amount of the penalty, not exceeding the total debt unpaid. But the city did not have to exhaust the assets of

the principal before a recovery from the surety. The fact that it recovered judgment and received payment from the surety before exhausting the principal does not alter the case. . . .

"The fault in the reasoning is readily seen when it is considered that the obligee may first apply all that the principal—obligor, can pay and then resort to the bond for any amount left unpaid, not exceeding the amount of the penalty *for it is the final amount left unpaid by the principal which is intended to be secured by the surety.*"

In Merrill v. National Bank of Jacksonville, supra, this court supports the contention made herein that the security furnished by the National stands between Groesbeck and ultimate loss, in the following language:

"Certainly the giving of collateral does not operate of itself as a payment or satisfaction, either of the debt or any part of it, and the debtor who has given collateral security remains debtor, notwithstanding, to the full amount of the debt. . . .

"In short, the secured creditor is not to be cut off from his right in the common fund because he has taken security which his co-creditors have not. Of course, he cannot go beyond payment, and surplus assets, or so much of his dividends as are unnecessary to pay him, must be applied to the benefit of the other creditors. And while the unsecured creditors are entitled to be substituted as far as possible to the rights of secured creditors, the latter are entitled to retain their securities until the indebtedness due them is extinguished.

"We can not concur in the view expressed . . . that 'the property pledged is in fact security for no more of the debt than its value will amount to; and for all the rest the creditor relies upon the personal credit of his debtor, in the same manner he would for the whole if no security were taken.'

"*We think the collateral is security for the whole debt and every part of it, and is as applicable to any balance that remains after a payment from other*

sources, as to the original amount due; and that the assumption is unreasonble that the creditor does not rely on the responsibility of his debtor according to his promise."

In

Buffalo, etc. Co. v. Title Guarantee & Trust Company, supra,

the holding of the New York court is tersely set forth in the syllabus:

'Held that plaintiff was entitled, after deducting the whole sum received as dividends from the bank's assets from the gross amount of the deposit, *to recover from the guarantor the residue of the debt up to the penalty of the bond."*

See also

Peoples v. Peoples Bros., 254 Fed. 489;
American Surety Company of New York v. Finletter, and Massachusetts Bonding & Insurance Company v. Finletter, et al., 274 Fed. 152;
U. S. Fidelity & Guaranty Co. v. Union Bank & Trust Co., 228 Fed. 448.

C

DOCTRINE OF RELATION BACK ERRONEOUSLY APPLIED.

The holding that the National may receive dividends from the assets of the bank before Groesbeck is paid in full was made to rest in this case upon the decision of the Circuit Court of Appeals in United States Fidelity & Guaranty Company v. Centropolis Bank, supra. In that case the court held that a depository surety upon the paymen of the penalty of its bond is entitled to compete with the depositor whom it securès even before the depositor is paid in full.

This conclusion was reached by resort to the so-called doctrine of relation back.

As applied to this case that doctrine means that while the National did not pay the penalty of its depository bond until several months after the failure of the bank, nevertheless the relation of debtor and creditor existed from the time the bond was executed and that upon payment of the penalty all rights growing out of such payment related back to the date of the execution of the bond. The court held that this doctrine applied in this case with such force as to give the National the character of a creditor of the bank as of the date it executed its depository bond to Groesbeck and to clothe it with the right to compete with Groesbeck in the assets of the failed bank even before Groesbeck is made whole.

Any rights which the National has against the receiver arise from the contract between the National and the bank and to that agreement Groesbeck was not a party. As to that agreement Groesbeck is a third person who has acquired lawful rights against both parties thereto. The bank as principal and the National as surety agreed to protect Groesbeck from loss. We contend the doctrine of relation back cannot be applied in favor of the National so as to deprive Groesbeck, an innocent third person, of the rights he had acquired against the National and the bank.

The right of relation back is not one which the surety may enjoy at all events. It "is a legal fiction invented to promote the ends of justice, * * * and it is never allowed to defeat the collateral rights of a third person lawfully acquired." It is invoked by courts of equity to assist only in cases when the withholding of its application would defeat the ends of justice.

In holding that the right of relation back is available to the surety at all events, the Circuit Court of Appeals, we submit, departed from the law as settled by this court in

United States Fidelity & Guaranty Company v. Wooldridge, supra.

In the Wooldridge case the surety company furnished a depository bond to the Gulf, Colorado and Santa Fe Railroad to secure the railroad against loss on account of its deposit in the Cleburne National Bank. The surety company had also furnished a fidelity bond to the Cleburne Bank to protect the bank against the misconduct of its cashier. The bank failed and the surety paid the Railroad the amount of its deposit for which it took an assignment of the Railroad's claim against the Bank's receiver.

Suit was brought by the receiver against the surety on the fidelity bond. In that action the surety relied upon its rights arising from the payment of the depository bond and attempted to set off such payment against the receiver's claim on the fidelity bond. In support of its claim to the set-off the surety company relied upon the doctrine of relation back. If, as the Circuit Court of Appeals held in this case, the doctrine of relation back is available to the surety at all events, the claim of set-off in the Wooldridge case would have been a good defense. This court, however, rejected the application of the doctrine and in concluding its opinion said:

> "The doctrine of relation 'is a legal fiction, invented to promote the ends of justice, and * * * it is never allowed to defeat the collateral rights of third persons lawfully acquired'."

This Court's opinion in the Wooldridge case finds support in a prior opinion:

Johnston v. Jones, 1 Black, 209, 17 L. Ed. 117, wherein this court says in part:

> "The counsel for the plaintiff in error insists that the deed from Robert A. Kinzie to Johnston related back to the date of the title bond from Kin-

> zie to Hubbard, and that this was a new element in the case, which required a change of the rule, as to the point of time to which the attention of the jury should have been directed. We do not think so. The doctrine of relation cannot be made to work such a result. *It is a legal fiction, invented to promote the ends of justice. It is a general rule, that it shall do no wrong to strangers.* It is applied with vigor between the original parties, when justice so required; but *it is never allowed to defeat the collateral rights of third persons, lawfully acquired.* Jackson v. Bard, 4 Johns. 234; Case v. DeGoes, 3 Cai. 262; 18 Vin. Abr. 287, Relation, B: Menvil's case, 13 Coke, 21; Wood v. Ferguson, 7 Ohio St. 291."

The holding of this court upon the doctrine of relation back has been followed by the Supreme Courts of North Dakota, Minnesota and Michigan and by the Circuit Courts of Appeals for the Sixth and Ninth Circuits. We have been unable to find any case except the Centropolis Bank case where a court has permitted the application of the doctrine to interfere with the rights of innocent third persons. The Sixth Circuit Court of Appeals in

> Springfield National Bank v. American Surety Co., supra,

had before it a case where the surety company undertook to set-off a claim of indemnity growing out of the payment of a depository bond against a claim asserted by the receiver of a failed bank on a fidelity bond.

In that case, as in the case at bar, the bank in its application for the bond agreed to "indemnify and keep indemnified" the surety against any loss sustained on account of the execution of the depository bond and that agreement was asserted in that case just as it was asserted in this case. It is significant, however, that in the Springfield National Bank case the surety had not only paid the pen-

alty of its depository bond, but the entire claim of the depositor. That case presented a situation where the entire loss indemnified against had been met, but even then the court refused to apply the doctrine of relation back. The court in that case held that the surety company's "potential liability on the depository bond was converted into a claim against the bank when and not until the bank becomes insolvent and unable to repay the state." The court further said:

> "To permit the performance of that obligation—payment of the deposit bond—to defeat a separate surety obligation would eventuate in an unfair distribution of the bank's assets among its creditors."

The Ninth Circuit Court of Appeals followed the same reasoning and reached the same result in

> Fidelity & Deposit Company of Maryland v. Robinson, supra,

In

> Storing v. Stutsman, 210 N. W. (N. D.) 653,

Stutsman was required to respond to the City of Mandan on a depository bond on which he was surety. He was sued by the receiver of the failed bank upon a note held by the receiver and pleaded his payment upon the depository bond as a set-off. His contention that the doctrine of relation back gave him the character of a creditor of the bank as of the date he executed the bond was rejected by the North Dakota Court in the following language:

> "The difficulty arises when it is attempted to apply the principle to the facts in the manner and with the effect urged by the defendant. The surety may unquestionably compel the principal to perform the obligation when due; but, in the case at bar, he could not under his contract or under the statutes compel the bank to pay or the city to receive the deposit before it came due or before demand by the

city. There was no demand by the city before insolvency; immediately when the bank became insolvent, the deposit was due and the rights of the defendant as surety became fixed. However, at the same moment of time, the rights of creditors and the receiver became fixed and the federal statute intervened, raising a barrier against any disposition of the assets of the insolvent constituting a preference, as therein defined. . . .

"The surety is, of course, an original promisor from the beginning; and, in the ordinary meaning of that term, his liability is no more secondary than is that of the maker of a promissory note. The city of Mandan, however, had and could have no right of action against the defendant until the principal had failed, upon demand, to repay the deposit; that failure took place, and, consequently, the cause of action in behalf of the city and against the defendant came into being at the moment when insolvency took place; and, at the same instant, the rights of creditors of the principal to a distribution of its assets without discrimination or preference became as absolutely fixed as the rights of the defendant which flowed from the suretyship relation. . . .

"*It solves nothing to cite the equitable doctrine of relation. That legal fiction originated in a desire to do justice, and resort cannot be had to it when the result is to defeat the rights of third persons lawfully acquired.* Gilbertson v. Northern Trust Company, supra. *The question on which the instant case turns can be correctly answered only by an examination of the rights of the surety and a determination of the point of time when they became fixed. If the surety had a right to a set-off which had accrued or become fixed prior to insolvency, it would in no manner be affected by the bank's closing its doors. Suppose that, prior to insolvency the bank had sued the defendant on the notes in suit and while the city of Mandan was a depositor, but before demand or refusal to repay the deposit; could he have set up his primary obligation, as he describes it, on the bond to defeat, reduce or delay recovery on the notes? - Clearly not.*"

Of like import is the case of

Veigel v. Converse, 210 N. W. 162,

wherein the court in rejecting the application of the doctrine said:

> "The starting point for decision is the proposition that, when a bank becomes insolvent and goes into the hands of a receiver, 'the respective rights and liabilities then existing between it and its creditors and debtors become fixed' and its net assets, after satisfying the claims of preferred creditors, if any, are subject to 'disposal and ratable distribution among all its general creditors, upon the principle of equality. No subsequent lien can be created, or *right* or preference obtained.' Balch v. Wilson, 25 Minn. 299, 33 Am. Rep. 467."

See also the strong statement of the Supreme Court of North Dakota in

Gilbertson v. Northern Trust Co., 207 N. W. (42).

> "The purpose of such relation, however, is to do justice between principal and surety; to give to the surety, who discharges the principal's obligation, any rights and remedies which the obligee had as against the principal during the time that the surety contract was in existence. But this theory of relation cannot be invoked to do injustice as against third parties."

Zimmerman v. Chelsea Savings Bank, supra,

is a case upon which we place great reliance because of the fact that in it all of the points urged by the National both in this and in the former suit between these parties and also all the points advanced by the Circuit Court of Appeals in its opinion in the Centropolis case were raised and decided. The fourth point there urged by the surety company in support of its claim to the right to share pro rata in the assets of the failed bank reads as follows:

> "Fourth, That the agreement of indemnity given by the bank to the surety company took effect as of its date immediately upon payment on the bond, and that such agreement entitled the surety to stand as a creditor of the bank and receive its share of any dividends paid."

The Supreme Court of Michigan, however, refused to apply the doctrine of relation back in that case.

The holding in the cases just cited to the effect that the date of insolvency of the bank is the date to which resort must be had in fixing claims against the receiver finds support in the case of Merrill v. National Bank of Jacksonville, supra, wherein this court in part says:

> "The distribution is to be 'ratable' on the claims as proved or adjudicated, that is, on one rule of proportion applicable to all alike. In order to be 'ratable' the claims must manifestly be estimated as of the same point of time, and that date has been adjudged to be the date of the declaration of insolvency."

The holding that the doctrine of relation back is a legal fiction invented to promote the ends of justice and will never be allowed to work an injustice against innocent third parties becomes at once applicable to this case when the court understands that not only has Groesbeck and the American, his assignee and subrogee, not been made whole but likely never will be.

It is unjust for Mr. Groesbeck, who is liable to the American Surety Company for the final deficit herein, to have this case decided upon authority of the Centropolis Bank case. The doctrine of relation back though erroneously applied was applied in the Centropolis Bank case with less violence to the equities of Jackson County than will be the case with Groesbeck if applied here. Jackson's Coun-

ty's deposit was $122,324.59. It received $100,000.00 from depository sureties and had its claim against the receiver allowed for the full amount. Dividends amounting to as little as 20 per cent on that claim would wholly repay Jackson County. The situation in which Groesbeck finds himself is much more unfortunate. Jackson County will doubtless be paid in full even in the face of the application of the doctrine of relation back, while Groesbeck, in the fact of such application, is certain to lose many thousands of dollars.

If by recourse to the doctrine of relation back the National is to be permitted to now recover $75,000 of the $125,000 paid on account of its bond, while Groesbeck is still unpaid, then the doctrine of relation back will have been employed not to promote the ends of justice but to absolve the surety company from the obligation of its contract and to "defeat the collateral rights of third persons, lawfully acquired."

Only by the erroneous application of the doctrine of relation back could the court reach its conclusion in the Centropolis Bank case. Since that doctrine can have no application to such a case as this it follows that with the rejection of the doctrine the decision herein must be reversed.

The National was not a creditor of the bank at "the date of the declaration of insolvency" and since this court has held that that is the controlling date, the Eighth Circuit Court of Appeals erred in holding that the National can share with those who were creditors and depositors upon that date. Herein lies the fundamental error in allowing the National to share with those who were general creditors and depositors at the time the bank closed its doors.

III.

COURT'S DECISION WILL RESULT IN UNFAIR DISTRIBUTION OF BANK'S ASSETS AMONG ITS CREDITORS IN VIOLATION OF NATIONAL BANKING ACT.

The National Banking Act (R. S. 5236 Sectioin 194, New U. S. Code, Annotated) requires that dividends to creditors of the bank shall be ratable and without preference. The penalty of the National's bond never went into the assets of the bank for ratable distribution to its creditors and if the decision of the Circuit Court of Appeals shall finally result in payment of dividends to Groesbeck on the full amount of his deposit and also upon the full amount of his depository bonds, then there is to be paid on account of Groesbeck's deposit an amount disproportionate and unfair to general creditors. Such decision establishes a preference in favor of Groesbeck's deposit to the detriment of other depositors of the bank and violates the intention of Congress as expressed in The National Banking Act.

At the time the bank failed Groesbeck had on deposit the sum of $643,094.29 for which amount (less $75,000.00 assigned to Fidelity and Deposit Co.) he was entitled under the law to have his claim allowed and approved. He was entitled to receive dividends on the full amount without regard to any collateral which he held. Merrill v. National Bank of Jacksonville, supra.

But, if his depository sureties, after the insolvency of the bank, are entitled to pay the penalties of their bonds and then receive dividends pro rata on the amounts paid, the effect will be that Groesbeck's deposit will draw dividends from the assets of the bank upon its full face value, plus the amount of any depository bonds which he held.

This would give his deposit a dividend earning capacity proportionately greater than the dividend earning capacity of other deposits, resulting in a preference against depositors in general and an unfair distribution of the bank's assets.

Clearly to allow the National Surety Company to recover upon its indemnity agreement will "eventuate in an unfair distribution of the bank's assets among its creditors." A simple case will serve to illustrate the situation. Assume ten individuals constitute all the depositors in a bank upon its failure and that each of the ten has $10,000.00 upon deposit. One would naturally assume under such a state of facts that each of the ten depositors would share equally in and receive one-tenth of the dividends paid by the receiver. If, however, one of the depositors was a custodian of public funds, as in this case, and had taken the precaution to secure a depository bond, then that $10,000.00 deposit under the decision in this case, would receive dividends not simply on such $10,000.00 deposit but also would receive dividends on the additional amount paid in connection with such deposit under the depository bond. In other words, that $10,000.00 deposit, if the depository bond were in the sum of $5,000.00, would draw dividends based on once and a half the amount of the deposit: first, upon the depositor's claim, and, second, upon the indemnity contract. The result would be that the other nine depositors would not receive the proportion of the dividends paid which their deposits bear to the total of bank's deposits; and where, as in this case, the depository bond is for a large sum, the "unfair distribution of the bank's assets among its creditors" becomes even more disproportionate. If the law of this case is permitted to stand, the liabilities of a bank will not have a direct relation to its deposits, and depositors will not share equally and in proportion to their

deposits, but dividends will be distributed on the basis of deposits plus liability by virtue of indemnity agreements given by the bank in connection with depository bonds.

Appreciation of this resulted in the Sixth Circuit Court of Appeals in the case of Springfield National Bank v. American Surety Company of New York, supra, holding that to allow the claim of the depository surety "would eventuate in an unfair distribution of the bank's assets among its creditors."

IV.

DECISIONS OF EIGHTH CIRCUIT COURT OF APPEALS IN THE TWO CASES INVOLVING THIS SAME MATTER CONFLICT.

The decision of the Circuit Court of Appeals of which we complain is in conflict with its decision in the former case between these same parties involving this same fund.

By the decree in the first case it was held that the American, as assignee and subrogee of Groesbeck, should receive all dividends accruing on account of Groesbeck's claim until the American and Groesbeck were made whole; that until such time the National should receive nothing.

The National argues that the first decree does not specifically and in so many words deny its right to participate in the assets by force of its indemnity agreement. But the Circuit Court's decision in the first case affirmed the District Court's decree denying the National the right to in any manner deplete the funds out of which Groesbeck and the American were to be made whole until they had been paid in full. Any other construction renders the first decree ineffectual to accomplish its purpose. If the first decree prevented participation in the funds by the National until Groesbeck and the American are made whole, it would

be ineffectual if it left a way open for the National to enter by any other avenue and thereby deplete the funds in the hands of the receiver to Groesbeck's and the American's detriment. We contend that the first decree denied the National the right to participate in the funds in the hands of the receiver until Groesbeck and the American were wholly paid, while the present decision of the Circuit Court authorizes the National to compete with Groesbeck and the American in the enjoyment of the same fund.

If we are correct in this position then it becomes at once apparent that both decisions cannot be given full force and effect and if the second decision is to become final, the effect of its becoming final is to nullify its first decision. The first decree, affirmed by the Circuit Court, became final before this case was filed and the Circuit Court of Appeals had no jurisdiction or power to thereafter reverse or modify it.

There is a second ground of conflict between the first and second decisions of the Eighth Circuit Court in this matter. The second decision in this case, as well as that in the Centropolis Bank case, is opposed to fundamental principles of suretyship law which were recognized and approved by the Eighth Circuit Court of Appeals in its first decision, and to that extent and in that respect the second decision is squarely in conflict with the previous decision of that court in this same matter.

It is well established that the rights of a surety can never rise above those of its principal:

> "The surety has no rights superior to those of the principal and cannot enforce a lien which the latter could not have enforced." (37 Cyc. 429).
>
> "The surety cannot be placed in a more favorable position than the principal." (37 Cyc. 429).

In the first decision by the Eighth Circuit Court of Appeals between these parties that court in its opinion affirmed the foregoing principles and in that connection observed (R. 115):

> "Obviously the Bank cannot complain of its own fraud nor can its surety for ordinarily 'a surety cannot be placed in a more favorable position than the principal'." (37 Cyc. 429).

The application of this principle to the present situation is fatal to the claim of the National that it is entitled to dividends upon its indemnity agreement with the bank before the Bank has paid to Groesbeck the whole of his deposit. As between Groesbeck and the bank there can be no argument as to the treasurer's superior right to be paid in full from the assets of the bank before the bank can claim anything for its stockholders, and since the National, as surety, cannot be placed in a more favorable position than its principal *this case is effectually reduced to the simple proposition that the National cannot enjoy rights with respect to moneys available for dividends if the bank could not enjoy them.* The National is, therefore, in effect, arguing in this case that to the extent of its claim for dividends, under its indemnity agreement, the bank *has a right to share with Groesbeck in the moneys available for paying dividends; and this before Groesbeck has been paid in full.*

The bank not only guaranteed payment to Groesbeck of his deposit, but indemnified him against loss on account thereof. Once this case is reduced to its simplest terms it is found, by application of the foregoing principle, to be nothing more than a contest between the bank and Groesbeck, with the National asserting rights under a contract with the bank, superior to what the bank itself could assert. If the National cannot be placed in a more favorable

position than its principal, the bank, then it would seem clear that the National cannot assert rights to any dividends by virtue of its indemnity agreement with the bank until Groesbeck has been paid in full.

V.

RES JUDICATA

The Circuit Court of Appeals erred in holding that the subject matter of this suit had not been adjudicated in the first suit between the same parties. Its conclusion on this point is embodied in the following language:

> "The cause of action asserted by the National Company in the former suit was predicated upon its alleged right of subrogation. The cause of action sought to be enforced by the National Company in this case is predicated upon its contract of indemnity. It is a cause of action which is wholly independent of, and entirely separate and distinct from, the alleged cause of action asserted by the National Company in the former suit. Since the National Company seeks relief in the instant case upon a different and distinct cause of action from the one asserted by it in the former suit, the judgment in the former suit is conclusive only as to such points or questions as were actually in issue and adjudicated therein."

In its opinion upon this point, however, the court says that:

> "It is true that the National Company, in its answer in the former suit, alleged the contract of indemnity, and prayed that its claim thereon against the receiver be allowed and approved. But such claim was not a proper subject for litigation in the former suit. It was the subject of an independent suit by the National Company against the receiver. The American Company so contended in its brief on appeal in the former suit. Since it is a matter which could not properly have been litigated, and was not actually litigated, and was not necessarily

> determined by the decree, in the former suit, it is not concluded by that decree *although it was put in issue by the pleadings.*"

In this action the National relies upon an alleged right to indemnity, the basis for which is an agreement, made with it by the bank at the time its depository bond was issued, to the effect that the bank would save the National harmless by reason of the execution of the bond. In the first suit this same agreement was pleaded and in its prayer the National asked that its claim based upon that indemnity agreement be allowed and approved and the receiver directed to pay dividends thereon.

The National's appeal to the Circuit Court of Appeals from the decree in the first case contains the following assignment of error:

> "The claim of this appellant arising out of said contract with said bank should have been allowed and approved by the trial court, and the receiver directed to pay to it dividends thereon." (Assignment of error No. 8, R. 126).

In support of that assignment of error the National in its brief to the Circuit Court of Appeals said:

> "*However*, we wish to say at the outset of this argument, and most emphatically, that *we rely foremost and primarily* upon our legal right of reimbursement, based upon the rights acquired and reserved by this appellant and given to it by said Bank as the inducement and consideration of its execution of said bond." (R. 143)

After the decree in the first case had become final, the National refiled its claim with the receiver. This refiled claim omitted to assert subrogation, which was urged originally, but the indemnity agreement and the payment relied upon in the refild claim was the same indemnity agreement and the same payment relied upon when the

claim was originally filed. The parties so stipulated. (R. 122) There was only one indemnity agreement and only one payment. When the National pleaded its idemnity agreement in the first suit, the American and Groesbeck denied the right of the National to have its claim allowed or to receive dividends thereon by reason of such indemnity agreement. Upon the trial of the first suit the indemnity agreement was received in evidence and relied upon both at the trial and upon appeal.

We thus have the National Surety Company pleading and relying upon the same indemnity agreement in the first suit that is pleaded and relied upon in the second suit, and in both suits issue was joined with the National upon its asserted claim to the right to draw dividends on account of said agreement.

Our contention that the National's rights under its indemnity agreement were adjudicated in the first action and that the decree in the first case is a bar to a subsequent suit upon the same indemnity agreement is, we think, amply supported by the authorities.

This court in

Cromwell v. Sac County, 94 U. S. 351, 24 L. Ed. 195

in part said:

> "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every

matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example; a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defense actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law, upon any ground whatever."

The parties to this suit and in the former suit are the same. The National in the former case alleged the same indemnity agreement it relies upon here. It prayed for the same relief in the former case for which it prays here. It offered in the former case exactly the same evidence in support of its right to indemnity which it offers here. There is, therefore, in the two suits an identity of parties, an identity of claims asserted and an identity of proof to support the claims. It may be asserted that it was not necessary in the former action to adjudicate the National's rights under its alleged indemnity agreement. As we have pointed out elsewhere herein, however, it was necessary to determine the rights of the National under its alleged indemnity agreement in order to make the adjudication of all the issues in-

volved in the former suit complete and to make the decree rendered efficacious.

There is here present every element which has lead courts to a finding of identity of causes of action in cases involving res judicata.

We invite the attention of the court to the statement of the law upon the subject as found in the following:

> "The allegations, it is true, are general, but they were sufficient had the petitioner so desired, to permit the introduction of testimony, including the record of proceedings before the immigration authorities and to allow his discharge if petitioner were entitled to relief on any of the grounds now urged * * *
>
> "According to the general principles of the doctrine of res adjudicata, a former judgment is a bar not only as to matters actually argued and decided, but also as to all other matters which might have been put in issue, argued and decided." Wong Sun v. Fluckey, 283 Fed. 989 at 991.
>
> "The petitioner had full opportunity to offer proof of it at the hearing on the first petition, and if he was intending to reply on that ground, good faith required that he produce the proof then. To reserve the proof for use in attempting to support a later petition if the first failed, was to make an abusive use of the writ of habeas corpus. No reason for not presenting the proof at the outset is offered. It has not been embodied in the record, but what is said of it there and in the briefs shows that it was accessible all the time." Wong Sun v. Fluckey, 283 Fed. 989, 265 U. S. 239, 68 L. Ed. 991.
>
> "The pleadings and judgment in the prior suit are not set out in this record, but it appears from the opinion of the trial judge that they were before and considered by him. From the pleadings before us the facts concerning that litigation are not in dispute except with respect to the ground upon which the court based its action in sustaining the demurrer, and we are able to consider the point urged as

fully as though the proceedings were fully set out in the records. . . . .

" 'A general judgment or decree of dismissal, without more, renders all the issues in the case res adjudicata and constitutes a bar to any subsequent suit for the same cause of action. Hence, when a court dismisses a suit upon some ground which does not go to the merits of the cause of action, but leaves them open to consideration in another court, or at another time, or in another way, the decree of dismissal must expressly adjudge that it is rendered for the specific reason upon which it it based, or must expressly provide that it is made without prejudice.' Fowler v. Osgood, 141 Fed. 20-24, and cases cited.

" 'It is well settled that a valid final judgment or decree, upon the merits, constitutes an absolute bar to a subsequent action or suit between the same parties upon the same claim or demand. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Except in special cases, the plea of res adjudicata applies not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. . . . The estoppel is not confined to the judgment, but extends to all facts involved in it, as necessary steps or the groundwork upon which it must have been founded. . . .

" 'A former judgment on the merits estops the parties thereto not only as to every ground of recovery which was actually presented in the action in which it was rendered, but also as to every ground which might have been presented. Thus, where the plaintiff in an action claims the right of property in a certain thing, the only question involved is whether the property in question belongs to him or not, and

> if the action results in favor of the defendant, it will bar any action against the same party for the same property, although the plaintiff failed to set up all the rights upon which he might have relied to maintain his cause of action. So also the judgment in an action to quiet title is conclusive of the title, whether adverse to the plaintiff in the action or to the defendant. In other words, it determines the merits of the plaintiff's title as well as that of the defendant.'" Hickey v. Johnson, 9 Fed. (2d) 498 (8 C. C. A.).
>
> "The test of the identity of the causes of action is the identity of the facts essential to maintain them." Hotellet v. Garden City Milling Company, 285 Fed. 693 (8 C. C. A.).

The foregoing decisions, in our judgment, state the law upon the subject and are in conflict with the conclusions reached in this case by the Circuit Court of Appeals.

The Circuit Court rested its decision upon the ground that the claim of the National in its first suit based upon its indemnity agreement "was not a proper subject for litigation in the former suit." The court in the same paragraph goes on to assert that the National "is not concluded by that decree" since its indemnity claim "is a matter which *could not properly* have been litigated" and the National is, therefore, "*not concluded by that decree* although it (the indemnity claim) *was put in issue by the pleadings.*"

Why was the National's claim, based upon its indemnity agreement, "not a proper subject for litigation in the former suit," and why was it a matter "which could not properly have been litigated" therein. The same parties were there as here; the Court had jurisdiction not only of them but of the subject matter as well, and had the jurisdictional power and right to hear and decide the cause of action there pleaded, based upon the indemnity agreement.

In the Centropolis Bank case the Surety relied in one action upon both subrogation and indemnity. The Circuit

Court in that case did not hold that the indemnity agreement was not a proper subject of litigation but on the contrary recognized it as properly before the Court and granted relief under it.

Courts of equity boast that they never do things by halves, and that having once taken jurisdiction of a controversy they will retain jurisdiction until the entire controversy between the parties has been disposed of. In accordance with this well recognized equitable principle, it has been the common practice in cases of this character for surety companies to assert at the same time and in the same suit not only rights by way of subrogation but rights by way of indemnity as well. That is what was done in Maryland Casualty Co. v. Fouts, supra, in Zimmerman v. Chelsea Savings Bank, supra, and in the case of American Surety Co. v. Barnesville Bank, supra.

Upon what theory can it be held that although the National's indemnity claim "was put in issue by the pleadings" in the first case that nevertheless "such claim was not a proper subject for litigation in the former suit?"

Since the decision complained of concedes that the National's claim, based upon its indemnity agreement, was "put in issue by the pleadings" in the first case, and since the same evidence was offered there as here, the same relief prayed for there as here, and since that cause of action is identical with the cause of action here sued upon, and since the parties to this suit were parties to the original suit, and since the court in the original suit, as in this suit, had jurisdiction of both the parties and the subject matter, it is submitted that the decree of the District Court in the first case renders that claim *res judicata* between these parties.

The District Court in holding this matter *res judicata,* used the following language:

"It seems to me clear, notwithstanding the theory relied upon by the plaintiff in this action to distinguish it from the former case, that the subject matter of the litigation is the same and that the former case has disposed of the subject matter definitely and that nothing is left to be disposed of in this case otherwise than therein determined.

"In that case the Circuit Court of Appeals affirmed the judgment of this court giving priority of payment to the American Surety Company of the amount due it through Mr. Groesbeck *before the plaintiff in this case can be paid anything.*

"Now you cannot change the decree by changing the theory of your cause of action. The subject matter of this obligation has been disposed of." . . . . (R. 210).

"As already said, by the decree in the former suit no funds are available for the liquidation of the plaintiff's indebtedness until Mr. Groesbeck as treasurer, or his guarantor, the American Surety Company, has been made whole. That judgment must stand." (R. 211).

Moreover, the National on the first appeal in this case, and in its petition for rehearing, placed the very construction upon the original decree which the District Court has placed upon it in deciding the present case, and argued that the District Court then erred in denying its claim based upon its indemnity agreement.

Even if it should be asserted that the issue with respect to the indemnity claim was not in terms passed upon by the District Court in the first case, if, nevertheless, as admitted in the decision complained of, that claim "was put in issue by the pleadings," it is respectfully submitted that the matter is nevertheless res judicata between these parties under the holding of the Eighth Circuit Court of Appeals in

Commercial Electric Supply Co. v. Curtis, 288 Fed. 657 (certiorari denied 263 U. S. 709):

"A final decree or judgment of a court between

> parties to a suit therein, of whom and concerning the subject-matter of which it (the court) has jurisdiction renders not only every claim and defense which they made and obtained a decision of, *but also every claim and defense that they might have made and that the court might have decided in that suit res adjudicata between them.*"

Since the indemnity claim "was put in issue by the pleadings" in the first suit, it is submitted that the decree in that case is conclusive "as to every question which was or might have been presented and determined in the former suit" including the claim now relied upon by the National.

CONCLUSION

It is respectfully submitted that this court should issue the writ herein prayed for and bring this case before it for review because:

1. The decision complained of is in conflict with the decisions of the Fourth, Sixth and Ninth Circuit Courts of Appeals wherein identical questions were raised and decided and an opposite result reached.

2. The decision involves a matter of great general and public interest, and the correct rule for the guidance of the Comptroller of the Currency in liquidating failed national banks and distributing their assets should be established by this court. The problem not only affects the Comptroller of the Currency but banks, surety companies and bank depositors as well.

3. The decision complained of involves a ruling upon important questions of general law that are untenable and that are contrary to the great weight of authority.

4. The decision conflicts with the previous decision of the same Circuit Court of Appeals involving the same parties and the same fund, and it is impossible to comply with both decisions. They cannot be reconciled.

5. The decision complained of involves the construction of the National Banking Act and the distribution of the assets of failed banks thereunder.

This court, upon reviewing the decision complained of, should reverse this case because;

1. The subject matter of the present suit is res judicata.

2. The decision of the Centropolis case which is adopted herein involves an erroneous application of the doctrine of relation back permitting the National, which was not a creditor at the time of the failure of the bank, to share with those who were depositors and creditors of the bank at that time and results in an unfair distribution of assets.

3. The decision permits the National, in violation of its contract, to compete with Groesbeck in the enjoyment of the dividends while its guaranty to him is still outstanding and unperformed. The decision fails to hold the National to its guaranty of Groesbeck's entire deposit and overlooks the proposition that it is the final amount left unpaid by the bank which the National secured. The decision relieves the National from the payment of the full penalty of its bond and the National is thus discharged from its contractual obligation not by performance but by the decree of the court.

Respectfully submitted,

EMMETT M. BAGLEY,
ROBERT L. JUDD,
PAUL H. RAY,
Solicitors for Edward E. Jenkins, Receiver, Petitioner
A. M. CHENEY,
JOHN JENSEN
HAROLD M. STEPHENS,
Solicitors for E.J.Groesbeck and American Surety Company, Petitioners.

"The Clerk will please enter appearances as follows:
for Edward E. Jenkins, Receiver, Petitioner,

Emmett M. Bagley.

of Counsel
Robert L. Judd
Paul H. Ray

for E. J. Groesbeck and American Surety Company, Petitioners,

John Jensen.

of Counsel
A. M. Cheney
Harold M. Stephens

RECEIVED three copies of the foregoing Petition for Writ of Certiorari and supporting brief this 1st day of August, 1927.

ARTHUR E. MORETON,
Solicitor for Respondent.

APPENDIX

United States Circuit Court of Appeals

EIGHTH CIRCUIT

United States Fidelity & Guaranty Company, Appellant,
vs.
Centropolis Bank of Kansas City, Missouri, a corporation, et al., Appellees.

Appeal from the District Court of the United States for the Western District of Missouri.

Before BOOTH, Circuit Judge, and PHILLIPS and JOHN B. SANBORN, District Judges.

PHILLIPS, District Judge, delivered the opinion of the court.

The United States Fidelity & Guaranty Company (hereinafter called Surety Company) brought this suit against the Centropolis Bank of Kansis City, Missouri, C. E. French, Commissioner of Finance of the State of Missouri, H. F. Lawrence, Deputy Commissioner of Finance of the State of Missouri, Jackson County, Missouri, and E. W. Hayes, Daniel G. Stewart and Henry Rummel, Judges of the County Court of Jackson County, Missouri, to secure a decree, adjudging that the Centropolis Bank, an insolvent banking corporation, is indebted to the Surety Company in the sum of $50,000 and that the Surety Company is entitled to share ratably with other general creditors in the distribution of dividends from the assets of the bank, directing Lawrence, as Deputy Commissioner of Finance, and his successors in office to pay the Surety Company its pro rata share upon its claim of $50,000 of all dividends distributable to general creditors, and enjoining such Deputy Com-

missioner and his successors from paying dividends upon such claim of $50,000 to Jackson County.

The material facts are not in dispute and are as follows:

The Centropolis Bank was a banking corporation organized under the laws of Missouri. On May 9, 1923, the County Court of Jackson County, Missiouri, by order duly entered, awarded a contract to the bank for one-tenth of the county deposits for the ensuing two years. On May 18, 1923, the bank made a written application to the Surety Company for a surety bond to secure such deposit with the bank. The application in part read as follows:

"The undersigned agrees as follows: * * *

2. To indemnify and keep indemnified, from and against all losses by reason of said (United States Fidelity & Guaranty) company having executed said bond * * *." It was duly executed by the bank. Pursuant to such application the Surety Company as surety, and the bank, as principal, executed and delivered to Jackson County a surety bond in the usual form for the penal sum of $50,000. The bond was conditioned as follows:

"The condition of the above obligation is such that whereas, the above bounden Centropolis Bank of Kansas City, was on the 9th day of May, 1923, by the County Court of Jackson County, Missouri, in regular session at Independence, Missouri, duly declared and awarded by said County Court to be the successful bidder as depository for one tenth of the funds of said County for a period of two years, beginning the 19th day of May, 1923, and ending on the 15th day of August, 1925, and to pay interest upon such one-tenth of the funds of said county so deposited with said depository computed on the daily balances with said depository, said Centropolis Bank of Kansas City, at the rate of 3.75 per cent per annum thereof, to the Treasurer of said Jackson County monthly.

Now, therefore, if the said Centropolis Bank of Kansas City shall faithfully perform all of the duties and obligations devolving by law upon said Centropolis Bank of Kansas City as depository of said one-tenth of said funds of said Jackson County, Missouri, as aforesaid, and pay upon presentation of all checks drawn on said depository whenever any funds therefor shall be in said depository when drawn thereon by the proper officers of said county, and that all interest will be promptly paid to the treasurer of said county monthly, and that all of said funds shall be faithfully kept and accounted for according to law, then the above obligation to be void, otherwise to remain in full force and effect."

At about the same time, the bank, as principal, and the Maryland Casulty Company, as surety, executed and delivered to Jackson County a surety bond for the penal sum of $50,000 conditioned the same as the bond of the Surety Company.

On November 14, 1924, the bank, having become insolvent, closed its doors. Whereupon, the Commissioner of Finance of the State of Missouri took charge of the bank and its assets, and since said date has been and now is engaged in liquidating such bank pursuant to the provisions of the laws of Missouri. (Sections 1 and 4 of the Act of March 24, 1921, Laws of Missouri 1921, p. 394, and Secs. 11700 to 11724, inclusive, Revised Statutes of Missouri 1919.) On the day the bank closed, Jackson County had on deposit therein pursuant to such order of the county court, the sum of $122,324.59. It presented checks for the amount thereof to the bank, payment was refused, and it made due demand upon the Surety Company to perform the obligations of its bond. On May 7, 1925, the Surety Company paid to Jackson County $51,441.65, the amount of the penal sum of the bond, together with interest from November 14,

1924, to May 7, 1925, and received from the county a receipt in full for such amount. The Maryland Casualty Company also paid Jackson County the sum of $50,000 with interest from November 14, 1924, to date of payment.

Jackson County filed with the Deputy Commissioner of Finance in charge of the liquidation of the bank, its claim for $122,324.59, the full amount of its deposit. On May 7, 1925, after its payment to Jackson County, the Surety Company filed with the Deputy Commissioner of Finance its claim for $50,000. The Commissioner of Finance approved and allowed the claim of Jackson County, and disapproved and rejected the claim of the Surety Company.

The assets of the bank are insufficient to pay its creditors in full.

After the rejection of its claim, the Surety Company brought this suit. It set up the above facts, and, basing its claim, both on the right of subrogation and on its contract of indemnity, sought the relief above stated.

Jackson County filed an answer and cross bill. By its cross bill it sought a decree directing the Deputy Commissioner of Finance to set aside and pay dividends on its entire claim of $122,324.59 until the amount of such dividends should equal the sum of $22,324.59, the balance remaining after deducting the payments made by the two surety companies.

The trial court held that the Surety Company was not entitled to be subrogated to the claim of Jackson County to the extent of $50,000; that it was not entitled to dividends on its claim for $50,000 pro rata with the general creditors; that it had a claim against the bank but that it was not entitled to receive dividends on such claim until Jackson County had been paid in full; that the Deputy Commissioner of Finance should pay dividends to Jackson County upon its claim of $122,324.59, until such dividends should

equal the sum of $22,324.59, and that he should then pay the remaining dividends, one-half to the Surety Company, and the other half of the Maryland Casualty Company. It entered its decree accordingly, and the Surety Company has appealed from such decree.

Counsel for the Surety Company now abandon any claim under the right of subrogation and predicate their case squarely upon the contract of indemnity.

The first contention urged by counsel for the Surety Company is that the county was only entitled to receive dividends on the sum of $22,324.59, the balance remaining due on the deposit after the application of the payments made to it by the two surety companies.

Where the creditor of an insolvent bank holds collateral security for the payment of its debt, it is entitled to the allowance of a claim for the full amount of its debt, and to the payment of dividends on the entire debt, pro rata with general creditors, until the dividends, plus the amount realized from the security, equals the full amount of the debt. *Merrill* v. *National Bank of Jacksonville*, 173, U. S. 131; *Chemical National Bank* v. *Armstrong* (C. C. A. 6) 59 Fed. 372; *Commercial & Savings Bank* v. *Jenks Lbr. Co.* (C. C.) 194 Fed. 732; *Washington-Alaska Bank* v. *Dexter Horton National Bank of Seattle, Washington*, (C. C. A. 9) 263 Fed. 304; *Goodman Mfg. Co.* v. *Pittsburgh-Buffalo Co.* (C. C. A. 3) 265 Fed. 561; *Pintsch Compressing Co.* v. *Buffalo Gas Co.* (C. C. A. 2) 280 Fed. 830, 844, 845; 32 C. J. p. 882, Sec 176.

Counsel for the Surety Company undertake to distinguish the instant case from the cases above cited. They say that in those cases the debts were either secured by a pledge of collateral or by a mortgage of property, and that here the debt was secured by a contract of suretyship. We are

unable to see any reason why the character of the security held by the debtor should change the rule. We have found only one case on the question where the debt was secured by a contract of suretyship. *Citizens National Bank* v. *Minge*, * * * *Minn.* 52, N. W. 44. In that case, the court said:

2. "Under the late federal bankrupt act, it was provided that, where a debt was secured on the property of the bankrupt, it could only be proved for the balance over and above the value of the security, unless the creditor filed a release of his security. Our insolvent law contains no express provision of this kind, and whether any such is implied is a question not now before us. But, under all bankrupt laws of which we have any knowledge, it has been uniformly held that, where the debt is secured by the property or personal obligation of a third person, who stands in the relation of surety, it is provable for its full amount against the estate of the bankrupt principal debtor, and that too, without the creditor being required to release his security. Any other rule would, for manifest reasons, be unjust alike to the creditor and to the surety."

We therefore conclude that Jackson County is entitled to the allowance of its claim for the full amount of the deposit, to-wit, $122,324.59, and to receive dividends thereon until such dividends shall equal the sum of $22,324.59.

The second contention urged by counsel for the Surety Company is that it is a general creditor of the bank on its contract of indemnity and is entitled to the allowance of a claim in the sum of $50,000 and to share in dividends thereon pro rata with other general creditors.

The contract of indemnity which the bank entered into with the Surety Company was not in contravention of any provision of law or of the public policy of the State of Mis-

souri. It was therefore a legal and enforceable contract. *National Surety Co.* v. *Blumauer* (C. C. A. 9) 247 Fed. 937; *Western Surety Co.* v. *Kelley*, 27 S. D. 465 131 N. W. 808; 31 C. J. 424, Sec. 16.

It is well settled that when a contract of suretyship is made there arises, in the absence of an express agreement, an implied contract that the principal will indemnify the surety for any payment the latter may make to the creditor in compliance with the contract of suretyship. This implied contract arises when the suretyship is made, and not when the payment is made by the surety thereunder. The relation of debtor and creditor exists between the principal and surety from the time the contract of suretyship is made. The payment relates back to the time when the contract was entered into by which the liability to pay was incurred, fixes the amount of damages for which the principal is liable to the surety and matures the cause of action therefor. *Rice* v. *Southgate*, 16 Gray, 82 Mass. 142: *Griffin* v. *Long*, 96 Ark. 268, 131 S. W. 672; In re Stout (D. C.) 109 Fed. 794; *Smith* v. *Young*, Ala. 55 South 425; *Hatfield* v. *Merod*, 82 Ill. 113; *Berry* v. *Ewing*, 91 Mo. 395, 3 S. W. 877; *Martin* v. *Ellerbe's Admr.*, 70 Ala. 326, 335; *Poe* v. *Dixon*, 60 Oh. St. 124, 54 N. E. 86, 88; *Loughridge* v. *Bowland*, 52 Miss. 546; *Bragg* v. *Patterson*, 85 Ala. 233, 4 South 716, 717; *Barth* v. *Graf*. 101 Wisc. 27, 76 N. W. 1100, 1103; *Nally* v. *Long*, 56 Md. 567; *M. Kahn & Bros.* v. *Bledsoe*, Okla., 98 Pac. 291.

In *Rice* v. *Southgate, supra*, the court said:

"Upon well settled principles, it is clear that the contract of a principal with his surety to indemnify him for any payment which the latter may make to the creditor in consequence of the liability assumed takes effect from the time when the surety becomes responsible for the debt of the principal. It is then that the law raises the implied

contract or promise of indemnity. No new contract is made when the money is paid by the surety, but the payment relates back to the time when the contract was entered into by which the liability to pay was incurred. The payment only fixes the amount of damages for which the principal is liable under his original agreement to indemnify the surety. *Gibbs* v. *Bryant*, 1 Pick. 121. *Appelton* v. *Bascom*, 3 Met. 169."

In *Griffin* v. *Long, supra,* the court said:

"The true rule seems to be that the surety becomes a creditor of the principal at the time he signs the note as surety, and not at the time he pays the same."

In *Smith* v. *Young, supra,* the court said:

"Although a surety cannot maintain an action against his principal on the liability created by the suretyship, until such surety has paid the debt or a part thereof, it is because the right of action does not come into existence until such payment, and not because the relation of debtor and creditor did not theretofore exist. The same thing is true as to the creditor or payee of a note signed by the principal and surety. The payee cannot sue the principal or the surety until the note is due, yet the relation of debtor and creditor certainly exists from the making of the note."

In *M. Kahn & Bros.* v. *Bledsoe, supra,* the court said:

"It has been repeatedly held by the courts that a surety is a creditor of his bankrupt principal, and that he is such creditor before default and from the date of signing the note."

A fortiori such results must follow where an express contract of indemnity is made.

The contract of indemnity created the relation of debtor and creditor between the bank and the Surety Company

from the date the contract of suretyship was executed and delivered to Jackson County. The payment made by the Surety Company related back to the date of the contract of indemnity, fixed the amount of damages for which the bank was liable to the Surety Company and matured the latter's cause of action on the contract of indemnity.

It follows that the Surety Company became a creditor of the bank on May 19, 1923, when the county depository bond was executed and delivered; that the Surety Company was a creditor of the bank when the bank became insolvent, closed its doors and went into the hands of the Deputy Commissioner of Finance for the purpose of liquidation on November 14, 1924; that upon the payment by the Surety Company of the penalty of the bond on May 7, 1925, a cause of action accrued in its favor against the bank which had its inception in the contract of indemnity and which related back to the date of the contract of suretyship made May 19, 1923.

What remedy has the Surety Company on this cause of action? The act under which the assets of the bank are being collected, distributed and paid out to creditors contemplates that all of the bank's assets shall be collected, converted into money and distributed to the creditors, and that the banking corporation shall be dissolved, unless the creditors are paid in full. Secs. 11713, 11715, 11716, 11717, 11718, 11719, 11720, 11721, 11722, and 11702, Rev. St. Mo. 1919. The mere fact that the claim accrued after the bank was closed and placed in the process of liquidation should not prevent, under such circumstances, the Surety Company from having its claim allowed.

In the case of *Spader* v. *Mural Decoration Mfg. Co.*, N. J. Eq., 20 Atl. 378, certain persons had entered into contracts with the corporation for personal services for a term of years. Before these contracts expired, and while they

were in full force and effect, the corporation became insolvent and was placed in the hands of a receiver. Thereafter, the contracts were breached and persons employed by the corporation under such contracts filed their claims with the receiver. In passing on these claims, the court said:

"The general scheme of the act contemplates the ascertainment and payment of all just liabilities. The terms 'creditor' and 'debt' are not used in a narrow, restrictive, or technical sense. It could hardly have been the intention of the law-makers to distribute the surplus of assets, or, in other words, return capital, to the stockholders of the company,—that is, to those who deliberately ventured for gain, and pledged their capital for the security of those who were induced to deal with them,—and at the same time disregard those who, dealing with those stockholders upon the faith of that security, became justly entitled to damages for breaches of contracts occasioned by an insolvency and suspension that the very capital relied upon was intended to ward off. Such distribution would be the protection of capital against its just liability. The receiver is bound in duty, and clothed with power, to reach out and take in every conceivable asset due, or thereafter to accrue, to the corporation. A complete collection of assets is contemplated, and a full and final distribution of them is made possible. Such being the situation, natural justice demands that those who suffer from breaches of contract should be included in the distribution, even though the breaches and the consequent damages follow the insolvency, and I think that it is in consonance with the scope and design of the legislation considered to give the statute a broad and liberal interpretation which will admit of that justice being done. * * * I can see no reason, under this law, for distinguishing between cases where the breach of contract precedes the ad-

judication of insolvency and cases where the breach follows in consequence of that adjudication."
See also *Minneapolis Baseball Co.* v. *City Bank,* 74 Minn. 98, 76 N. W. 1024; *McGraw* v. *Union Trust Co.,* 135 Mich. 609, 98 N. W. 390.

We think the Surety Company is a creditor and that it has a claim within the meaning of the statutes of Missouri referred to above.

We therefore conclude that the Surety Company is entitled to have its claim allowed for the sum of $50,000 and to share in the distribution of the assets of the bank.

There is nothing in the act which creates any priority as between the claims of general creditors. Jackson County, the other depositors of the bank, and the Surety Company are general creditors. They are entitled to share ratably unless there is something in the contract of suretyship which gives Jackson County a priority over the Surety Company.

Counsel for the county and for the Deputy Commissioner of Finance seek to find this right of priority in the provisions of the condition of the bond. They say the condition was that the bank should faithfully perform all of the duties and obligations devolving upon it as a depository of the funds of Jackson County, and should pay upon presentation all checks drawn on such depository and that all funds of the County deposited with the bank should be faithfully kept and accounted for according to law. They contend that by these provisions of the bond, the bank, as principal, and the Surety Company as surety, guaranteed the payment of the full deposit, and that to permit the Surety Company to share pro rata with the general creditors in the payment of dividends will lessen the amount of dividends payable to the county, and thereby violate the spirit of the guaranty. They cite in support of their position: *Maryland*

Casualty Co. v. *Foutz,* (C. C. A. 4) 11 F. (2d) 71, and *Zimmerman* v. *Chelsea Savings Bank,* 161 Mich. 691. 125 N. W. 424. In support of their contentions, counsel for the Surety Company cite *United States F. & G. Co.* v. *Carnegie Trust Co.,* 164 N. Y. S. 92, 221 N. Y. 646; 117 N. E. 1086; *American Surety Company of New York* v. *National Bank of Barnesville* (D. C. Southern District of Ohio, not officially reported); *In the Matter of Dailey and Ivins, Bankrupts* (D. C. New Jersey, not officially reported).

If the question here were one of subrogation, we could readily agree with the contentions of counsel for the Commissioner of Finance and the County. It is a familiar principle of the law of subrogation that a surety liable only for part of the debt does not become subrogated to collateral or to remedies available to the creditor unless he pays the whole debt or it is otherwise satisfied. *United States* v. *National Surety Co.,* 254 U. S. 73; *United States F. & G. C.* v. *Union Bank & Trust Co.,* (C. C. A. 6) 228 Fed. 448, 455; *National Surety Co.* v. *Salt Lake County* (C. C. A. 8) 5 Fed. (2d) 34, 36. The reasons for the rule are well stated in *Guaranty Co.* v. *Trust Co., supra,* where the court said:

"The right of a surety on a bond to be subrogated for the obligee in a right of action against one wrongfully causing the liability is founded on payment by the surety to the obligee, and it does not come into existence except upon full payment of the loss indemnified against. This is because subrogation is of an equitable character, and the surety cannot be permitted to take away from the obligee, to the latter's prejudice, securities or rights in which he is still beneficially interested.

But here, the Surety Company does not claim through subrogation, any right of Jackson County, but asserts an independent claim in its own right upon a contract which it entered into with the bank.

Contracts of suretyship should be interpreted like other classes of contracts, according to the sense and meaning of the terms which the parties have used, and those terms should be taken, understood and given effect in their plain, ordinary and popular sense, fairly and justly to all the parties to the contracts. *New Amsterdam Casualty Co.* v. *Central Natl. Fire Ins. Co.* 4 F. (2d) 203, 208; *Atlas Reduction Co.* v. *New England Ins. Co. of New Zealand* (C. C. A. 8) 138 Fed. 497; *Hawkeye Commercial Men's Ass'n* v. *Christy,* 294 Fed. 208; *Imperial Fire Ins. Co.* v. *Coos County,* 151, U. S. 452, 462, 463.

We think that a construction of the bond in the instant case in accordance with above rule compels the conclusion that it was the intention of all of the parties to the contract that the Surety Company should be liable to the county for *all* of the principal of the county's deposit, together with interest thereon, up to and including, but not exceeding, the sum of $50,000, and that the recital in the bond that the penal sum thereof is $50,000, just as effectually limits the language of the condition as if there had been written into the language of the condition itself the words "up to and including but not exceeding $50,000." It is true that the liability under the bond was not limited to any particular portion of the whole deposit. In that sense, the bond was security for the whole deposit, and for that reason the right of subrogation does not exist, but the maximum amount for which the Surety Company could be held liable thereunder was expressly fixed at $50,000. The Surety Company has discharged that liability by payment in full. The county has received all that it contracted for from the Surety Company. How then can the county say that the spirit of the guaranty will be violated? We find nothing in the language of the bond which justifies the contention that the claim of the county upon its contract of deposit should be

given any priority over the claim of the Surety Company upon its contract. This conclusion has not been reached without a careful consideration of the opinion of the Fourth Circuit in *Casualty Co.* v. *Foutz, supra,* and the Supreme Court of Michigan in *Zimmerman* v. *Bank, supra.*

The Surety Company contracted to reimburse the county for the defaults of the bank up to and including the penal sum of $50,000. It has fully performed that contract. It in turn took a contract from the bank to indemnify it for such loss on its part under the bond. Such contract of indemnity was valid. It created the relation of debtor and creditor when the bond was executed and delivered. It has been breached. The Surety Company asserts a claim for damages on account of such breach as a general creditor of the bank. Such being the facts and the relation of the parties we can see no logical answer to the contention that the Surety Company is entitled to the allowance of its claim as a general creditor on its contract of indemnity and to share in dividends thereon pro rata with other general creditors.

The decree of the court below is therefore reversed and the cause is remanded with instructions to modify the decree in accordance with this opinion. The costs of the appeal will be assessed equally against Jackson County and the Commissioner of Finance as liquidating officer of the bank. It is so ordered.

Filed February 9, 1927.

FILED

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CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1937

EDWARD E. JENKINS, Receiver of The National City Bank of Salt Lake City, Utah, et al.,

Petitioners,

vs.

THE NATIONAL SURETY COMPANY,

Respondent.

No. 424

ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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